Supreme Court, U.S.
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No. 03 531

In The
# Supreme Court of the United States

YARDARM RESTAURANT, INC.,

*Petitioner,*

v.

THE CITY OF POMPANO BEACH,

*Respondent.*

**On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fourth District**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Must Florida comply with this Court's repeated holding that a regulatory taking of private property occurs when government action fails to substantially advance a legitimate state interest, or is it free to disregard that 5th Amendment rule as it did here?

2. When local government officials repeatedly, and secretly, conspire to violate the rights of a property owner, engaging in what the trial court found on ample evidence were "egregious and deliberate acts orchestrated by members of the highest legislative body of the city, under extreme circumstances involving bad faith and institutional bias," is procedural due process satisfied by the mere presence of state courts to review such lawless behavior after the fact, when the city provides no due process of its own?

3. In determining whether there is a denial of substantive due process of law when a local government, acting through its highest officials, engages in a concerted campaign lasting for years to violate the rights of a single property owner (including multiple violations of court orders to respect that owner's rights):

(a) Does it make any difference whether or not the City officials "authorize" their unlawful conduct in a formally adopted resolution or ordinance or some other "official" act?

(b) Does it make any difference whether the property rights that were violated arose directly from the Constitution or were created by state law (the latter being the case with virtually all property rights)?

## PARTIES TO THE PROCEEDING

All parties are listed in the caption. Yardarm Restaurant, Inc., has neither a parent nor subsidiaries. Its stockholders are James Stephanis and Thomas Stephanis. The corporation was forced into bankruptcy because the Respondent City's acts rendered it insolvent.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS | 3 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR GRANTING THE WRIT | 8 |
| I. FLORIDA TAKINGS LAW CONFLICTS WITH THIS COURT'S SETTLED DECISIONS – IT IS NOT RECONCILABLE WITH *AGINS v. CITY OF TIBURON* AND ITS PROGENY | 8 |
| II. FLORIDA DUE PROCESS LAW CONFLICTS WITH VIRTUALLY ALL COURTS BY HOLDING THAT ONLY CONSTITUTIONALLY CREATED RIGHTS RECEIVE DUE PROCESS PROTECTION – WHEREAS THIS COURT HAS REPEATEDLY HELD THAT PROPERTY RIGHTS ARE GENERALLY CREATED BY STATE LAW AND ARE NONETHELESS ENTITLED TO FEDERAL CONSTITUTIONAL PROTECTION | 12 |
| III. BY HOLDING THAT DUE PROCESS VIOLATIONS CAN ONLY BE COMMITTED BY AN *OFFICIAL* VOTE OF THE LOCAL LEGISLATIVE BODY, THE FLORIDA COURTS HAVE NOT ONLY DISREGARDED THIS AND OTHER COURTS' TEACHINGS, BUT HAVE CREATED A SITUATION IN WHICH MUNICIPAL LAWLESSNESS RULES | 13 |

TABLE OF CONTENTS – Continued


Page

IV. THERE IS CONFLICT AMONG LOWER COURTS AS TO WHETHER MANIFOLD DENIALS OF PROCEDURAL DUE PROCESS CAN BE CURED AUTOMATICALLY BY THE MERE AVAILABILITY OF JUDICIAL REVIEW ..... 17

V. THERE IS A NEED FOR A DUE PROCESS REMEDY AGAINST GOVERNMENT ACTIONS THAT, ALTHOUGH FALLING SHORT OF TOTAL CONFISCATION, ARE ARBITRARY AND IRRATIONAL. THE "ALL OR NOTHING" TAKINGS CLAUSE APPROACH OFTEN LEAVES PROPERTY OWNERS WITH NO REMEDY FOR SERIOUS DAMAGE CAUSED BY ARBITRARY AND CAPRICIOUS MUNICIPAL ACTIONS ..... 21

CONCLUSION ..... 27

TABLE OF AUTHORITIES

Page

CASES

*A.A. Profiles v. City of Fort Lauderdale*, 850 F.2d 1483 (11th Cir. 1988) ..... 11

*Agins v. City of Tiburon*, 447 U.S. 255 (1980) ... 9, 10, 11, 27

*American Civil Liberties Union v. Board of Educ.*, 55 Cal.2d 167, 359 P.2d 451 (1961) ..... 25

*Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988) ..... 23

*Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988) ..... 25

*Board of Regents v. Roth*, 408 U.S. 564 (1972) ..... 12

*Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986) ..... 15, 16

*Bryan v. City of Madison*, 213 F.3d 267 (5th Cir. 2000) ..... 13

*Burrell v. City of Kankakee*, 815 F.2d 1127 (7th Cir. 1987) ..... 24

*Carey v. Piphus*, 435 U.S. 247 (1978) ..... 18

*Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 334 F.3d 796 (9th Cir. 2003) ..... 22

*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) ..... 4, 9

*City of Pompano Beach v. Yardarm Restaurant, Inc.*, 834 So.2d 861 (Fla. App. 2002) ..... 1, 10

*City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) ..... 14

*Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995) ..... 11

*County of Sacramento v. Lewis*, 523 U.S. 833 (1998) ..... 26

TABLE OF AUTHORITIES – Continued

Page

*Crown Point I, LLC v. Intermountain Rural Elec. Assn.*, 319 F.3d 1211 (10th Cir. 2003) .....13

*Daniels v. Williams*, 474 U.S. 327 (1986).....23, 24

*DeCarlo v. Fry*, 141 F.3d 56 (2d Cir. 1998).....15

*Del Monte Dunes at Monterey v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990).....24

*Department of Transp. v. Weisenfeld*, 617 So.2d 1071 (Fla. App. 1993).....10

*DiBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592 (3d Cir. 1995).....25

*Dolan v. City of Tigard*, 512 U.S. 374 (1994) ..... 9

*Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) .....22, 27

*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) .....11

*Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21 (Fed. Cl. 1999) .....23

*Goss v. City of Little Rock*, 90 F.3d 306 (8th Cir. 1996).....11

*Harman v. Forssenius*, 380 U.S. 528 (1965).....15

*Herrington v. County of Sonoma*, 834 F.2d 1488 modified 857 F.2d 567 (9th Cir. 1987).....22

*Hughes v. Washington*, 389 U.S. 290 (1967) .....15

*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).....18

*Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987)..... 9

*Lane v. Wilson*, 307 U.S. 268 (1939).....13

TABLE OF AUTHORITIES – Continued

Page

*Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986) ..... 13

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) ..... 9

*Marbury v. Madison*, 1 Cr. (5 U.S.) 137 (1803) ..... 23

*McKinney v. Pate*, 20 F.3d 1550 (1994) (en banc) ..... 12

*Monell v. Department of Social Services*, 436 U.S. 658 (1978) ..... 14, 15

*Moore v. City of East Cleveland*, 431 U.S. 494 (1977) ..... 22

*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) ..... 19

*Nashville v. Browning*, 310 U.S. 362 (1940) ..... 15

*Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999) ..... 13

*Nectow v. City of Cambridge*, 277 U.S. 183 (1928) ..... 3, 21

*Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32 (1st Cir. 1992) ..... 25

*Nicholas v. Pennsylvania State University*, 227 F.3d 133 (3d Cir. 2000) ..... 17

*Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987) ..... 9, 27

*Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) ..... 15

*Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) ..... 27

*Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992) ..... 24, 26

TABLE OF AUTHORITIES – Continued

Page

*Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) ..... 27

*Reno v. Flores*, 507 U.S. 292 (1993) ..... 23

*Rochin v. California*, 342 U.S. 165 (1952) ..... 26

*San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) ..... 9

*Sauer v. New York*, 206 U.S. 536 (1907) ..... 12

*Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983) ..... 17

*Simi Inv. Co. v. Harris County*, 236 F.3d 240 (5th Cir. 2000) ..... 24

*State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002) ..... 11

*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) ... 4, 9, 27

*Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So.2d 54 (Fla. 1994) ..... 10

*Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002) ..... 13

*U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) ..... 13

*United Artists v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003) ..... 25

*United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266 (1943) ..... 12

*United States v. General Motors*, 323 U.S. 373 (1945) ..... 8

TABLE OF AUTHORITIES – Continued

Page

*United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) ..... 9

*Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977) ..... 25

*Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) ... 4, 17

*Weinberg v. Whatcom County*, 241 F.3d 746 (9th Cir. 2001) ..... 13, 18, 20

*Westborough Mall, Inc. v. City of Cape Girardeau*, 794 F.2d 330 (8th Cir. 1986) ..... 20

*Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118 (3d Cir. 2000) ..... 22, 25

*Yee v. City of Escondido*, 503 U.S. 519 (1992) ..... 9

*Zinermon v. Burch*, 494 U.S. 113 (1990) ..... 21

CONSTITUTIONS

U.S. Const. amend. V ..... 3

U.S. Const. amend. XIV ..... 3

STATUTES

28 U.S.C. § 1257(a) ..... 2

42 U.S.C. § 1983 ..... 2, 3, 14

Fla. Stat. § 166.041(3)(c) ..... 18

Fla. Stat. § 286.011 ..... 7

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Donald Hagman & Dean Misczynski, Windfalls For Wipeouts 12 (Am. Soc'y of Planning Officials 1978) ..... 19

Steven J. Eagle, Regulatory Takings, § 12-2, p. 977 (2d ed. 2001) ..... 26

## PETITION FOR WRIT OF CERTIORARI

Petitioner Yardarm Restaurant, Inc. prays that a Writ of Certiorari issue to review a final judgment of the District Court of Appeal of Florida, Fourth District.

## OPINIONS BELOW

The decision was filed on Oct. 9, 2002, and is reported as *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 834 So.2d 861 (Fla. App. 2002) (*Yardarm II*). (App., p. 1.) A timely Petition for Rehearing was denied in an unreported order filed Feb. 4, 2003. (App., p. 20.) By a divided vote, the Florida Supreme Court denied review on July 16, 2003. (App., p. 120.) An earlier appellate opinion, also called *City of Pompano Beach v. Yardarm Restaurant, Inc.*, is reported at 641 So.2d 1377 (Fla. App. 1994) (*Yardarm I*) and is at App., p. 22. The trial court's Feb. 23, 1999 judgment (including its findings of fact and the findings of fact from the 1991 trial) is at App., p. 48. The trial court's August 15, 1996 order reinstating all of Yardarm's federal claims after the first appeal is at App., p. 118.

## JURISDICTION

The operative facts began in 1972 — that's not a misprint, it was more than three decades ago — when Jim and Tom Stephanis, owners of one of the most successful restaurants in south Florida, sought to replace their waterfront restaurant with a hotel and marina, legal uses allowed by City of Pompano Beach ordinances.

Defiantly lawless City actions between 1972 and 1985 succeeded in preventing the project's development

and drove Petitioner into foreclosure and bankruptcy. In ruling for Petitioners, the trial court noted "the ironic end to this sorry saga" (App., p. 67) occurred when the City bought the property out of foreclosure for half its value, thus reaping the rewards of its lawless conduct.

Yardarm, the Stephanis brothers' corporate entity, sought compensation under both Florida and United States Constitutions for an uncompensated taking of property and for a deprivation of property without due process of law.[1]

Trial resulted in a decision for Yardarm, finding a taking under the Florida Constitution because the City's actions failed to substantially advance a legitimate state interest. (App., pp. 111-112.) That judgment was reversed in *Yardarm I* on the ground that a taking under the Florida constitution can ***only*** occur when landowners are denied all economically viable use of their land. (App., p. 38.) The matter was remanded for the trial of federal issues under 42 U.S.C. § 1983. (App., p. 47.)

On remand, a second trial judge addressed the federal claims (App., p. 118), and found the City violated Yardarm's rights to both procedural and substantive due process and had taken its property under the federal definition of taking established by this Court. The jury awarded $7,601,920; with pre-judgment interest, the total compensation came to $19,203,491. (App., p. 116.)

The Court of Appeal reversed again (App., p. 19); a divided state Supreme Court denied review (App. p. 120). This Court has jurisdiction under 28 U.S.C. § 1257(a).

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1 Federal constitutional claims under 42 U.S.C. § 1983 were held unripe at the pleading stage because the state takings claim was yet to be decided. (App., p. 31, fn. 6.)

## CONSTITUTIONAL AND STATUTORY PROVISIONS

*Fifth Amendment, United States Constitution*:

". . . nor shall private property be taken for public use without just compensation."

*Fourteenth Amendment, United States Constitution*:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

*42 U.S.C. § 1983*:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

## STATEMENT OF THE CASE[2]

This case could be called Florida's "Bleak House." Yardarm wanted to replace its restaurant with a perfectly

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2 Factual findings were made by two trial judges at two different trials. (App., pp. 48, 96.) The findings were not reversed by the Court of Appeal. It is settled that this Court will rely on a trial jurist's findings of fact in reversing a subsequent appellate determination. (See *Nectow v. Cambridge*, 277 U.S. 183, 188-189 [1928].)

lawful hotel and marina. But influential people who lived behind the restaurant thought that Yardarm's proposed project would interfere with their views of the harbor and lighthouse. They therefore set about to influence the City to prevent the development by any means necessary. They succeeded. The City thereafter engaged in what the trial court described as a process of "egregious and deliberate acts orchestrated by members of the highest legislative body of the city, under extreme circumstances involving bad faith and institutional bias." (App., p. 76.) As the first trial judge concluded:

> "Yardarm's cause is pregnant with equity. . . . The course of action chosen by the City initially and throughout the years that the parties have been engaged in litigation, must be described not only as arbitrary but also must be equated with 'unfair dealing.' " (App., p. 111.)[3]

This Court has suggested in recent years that bad faith on the part of governmental actors could result in constitutional liability. (*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 333 [2002]; *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 [1999]; *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 [2000]; *Id.* at 566 [Breyer, J.,

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3 The evidence was largely without conflict. The City's defense was based ***not*** on disputing that these acts occurred, but in urging that they did not create liability. That distinguishes this from most section 1983 cases where the disputes usually concern "whether the government had denied a constitutional right in acting outside the bounds of its authority . . . ." (*City of Monterey*, 526 U.S. at 722.) Here, the City's actions were plainly out of bounds.

concurring].) This case provides an exemplar of such action and a fit subject for addressing such a liability rule.

—*Item*: Yardarm's initial application was approved by the Building Official, the *only* local officer with jurisdiction to ensure compliance with the building code and to issue permits when plans conformed. (App., p. 54.) Four days later, he revoked that permit on order from the City Manager (who had no legal authority to make such an order [App., p. 63]). At the insistence of the City Manager, the Building Official twice more reviewed the plans. He still found that they conformed. In spite of that, the City Manager demanded that the permit not issue, and then forced the Building Official to write letters denying the permit. (App., p. 98.)

—*Item*: The Building Official was wrongly suspended for refusing to follow the City's unlawful orders to stop the Yardarm project. He was reinstated on administrative appeal to a different agency. (App., p. 54.)

—*Item*: From 1973 through 1981, the City repeatedly tried to change the standards for the Yardarm project in mid-stream. These changes included reductions in parking and room densities, rewriting the dock ordinance to preclude Yardarm's marina, and rezoning the property to require Commission approval of development changes. *Yardarm was forced to defend itself and its right to a permit in eight trial court or appellate proceedings — each of which it won.* (App., p. 102.) Chief among these were the three times it had to sue to get *the same relief*, i.e., forcing the City to apply the development standards in place on Feb. 14, 1974. As the trial court found, "the City was overly litigious, engaged in stonewalling tactics, and ignored the clear directives given by Judge Wehle." (App., p. 55.) "The protracted litigation in the 1970's was unreasonable, arbitrary and conducted in bad faith."

(App., p. 74.) Thereby, "the City . . . accomplished in a de facto fashion what it was legally prohibited from doing — killing the Yardarm project." (App., p. 56.)

—*Item*: During that marathon litigation, four trial judges ruled that the City was acting unlawfully. (App., p. 56.) But the City defied them.

—*Item*: All of that excessive litigation was directed by the highest officials in the City. (App., p. 89.)

—*Item*: In resolving one of the lawsuits, the City stipulated it would permit Yardarm to create its marina and support Yardarm in obtaining a permit from the U.S. Army Corps of Engineers. Instead, the Commission voted to block Yardarm's Corps application, and the City Manager urged the Corps to deny the permit. (App., p. 56.)

—*Item*: Neighbors of Commissioner Gomes testified that, in 1983, 1984, and 1985, they overheard regular Sunday morning phone conversations between Mr. Gomes and other Commissioners, during which they "discussed the Yardarm project and their animosity toward the project, their hatred of the Yardarm owner, their strategies on how to stop the project, and that they would do whatever they could to stop the hotel." (App. p. 65.)

—*Item*: Because of the City's actions to "harass the Yardarm people regarding the work in progress" (App, p. 102), and the non-stop litigation necessitated by it, Yardarm was not able to make much construction progress — something the City would use in 1985 as an excuse to revoke its permit. (App., p. 59.) Nonetheless, Yardarm was out of pocket $780,000 in "hard" construction costs, and another $1.3 million in "soft" costs (architects, engineers, planners, and the like). (App., p. 68.)

—*Item*: The City's obvious hostility prevented Yardarm from obtaining the financing it needed to complete the project. (App. pp. 57, 103.) Because of the

City's harassment, Yardarm defaulted on a short-term loan, and the lender foreclosed. (App., p. 67.)[4]

—*Item*: The City took advantage of the foreclosure by moving publicly to keep Yardarm from reinstating its building permit while moving secretly to repeal the ordinance allowing an 18-story building on the site. (App., pp. 59, 61.)

—*Item*: The trial court's finding of a concerted City policy directed by the Commissioners (App. p. 76) was supported, e.g., by former City Commissioner Emma Lou Olson (a member of the Commission during the critical years from 1976 to 1986 and from 1990 to 1998) who testified that the other Commissioners "had a policy of stopping anything that Yardarm was doing." (App., p. 61.) And, in 1985 — the year in which the Commission finally succeeded in ending Yardarm's project — Commissioner Olson testified that all the other Commissioners had "made derogatory remarks about the Yardarm outside the Commission meetings," and that Commissioners opposed to the project during the 1970s had made similar comments. (App., p. 61.)

—*Item*: The Mayor conceded that the City had neither acted wisely nor played by the rules. (App. p. 99.)

—*Item*: The City Commissioners conducted many meetings in secret, either away from City Hall or on the telephone, discussing revocation of the 18-story ordinance, in violation of Florida law that requires city officials to conduct all such business in public. (Fla. Stat. § 286.011.)

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4 As the first trial judge found, "Yardarm and its stock holders ultimately filed for bankruptcy primarily because of the City's action." (App., p. 112.)

—*Item*: After the foreclosure, the case was tried twice (*Yardarm I* intervening between trials). Two different trial judges listened to the evidence and agreed that the City's actions were outrageous, unlawful, and unrelated to any legitimate governmental concern.

The Florida Court of Appeal reversed, holding that Yardarm had no remedy for the wrongs it suffered, and the Florida Supreme Court denied review. Thus, this Petition.

## REASONS FOR GRANTING THE WRIT

### I

### FLORIDA TAKINGS LAW CONFLICTS WITH THIS COURT'S SETTLED DECISIONS — IT IS NOT RECONCILABLE WITH *AGINS v. CITY OF TIBURON* AND ITS PROGENY.

In *Yardarm I*, judgment for Yardarm for a taking under the Florida Constitution was reversed on the ground that, "unless there is a deprivation of substantially all economic, beneficial or productive use of the property, inverse condemnation is not the remedy." (App., p. 38.)[5]

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[5] One is hard-pressed to understand this holding's factual underpinning, since driving property owners into foreclosure, thus causing them to lose their land altogether, is about as categorical a deprivation of all of the owners' property rights as can be imagined. It is the deprivation of the owner, not accretion of any title or interest to the government, that creates the taking. (*United States v. General Motors*, 323 U.S. 373, 378 [1945].)

On remand, the second trial judge recognized that such a statement of the law invoked only ***half*** the *disjunctive takings test* required by this Court since 1980. In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court held that a regulatory taking occurs "if the ordinance does not substantially advance legitimate state interests ***or*** denies an owner economically viable use of his land." (Emphasis added; citations omitted.)[6] He therefore reinstated all federal claims, including the federal takings claim (App., p. 118), and ordered the case to trial.

After trial, the trial judge determined that the first half of the *Agins* formulation had not been dealt with in *Yardarm I*. Upon considering it, he found a taking (App., p. 70, fn. 5) because the City's actions, as the first trial judge found, were "purely political," having no relation to

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6 This Court has repeatedly relied on both prongs of *Agins* ever since. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 647 (1981) (Brennan, J., dissenting, but apparently expressing the views of five Justices, see 450 U.S. at 633-634 [Rehnquist, J., concurring]); *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 825, 834 (1987); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-1016 (1992); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 703-704 (1999); *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 344 (2002). Indeed, in *Del Monte Dunes*, the Solicitor General had urged the Court to eliminate the first prong of the *Agins* test, but the Court declined. (526 U.S. at 704.)

proper police power objectives (App., p. 112).[7] The record was clear that the City's actions amounted to pandering to influential NIMBYs[8] in the community, and did not advance any legitimate public interest.

In *Yardarm II*, the Court of Appeal reversed again. This time — having held on the first appeal that Florida only uses the second half of this Court's *Agins* test for takings — the appellate court held that *Yardarm I* was *res judicata*, assertedly *because the state and federal takings tests are "identical."* (App., p. 9.) That plainly isn't so.[9] Regardless, both appellate court holdings cannot be valid. Either the Florida rule is "identical" to this Court's rule — in which case the first trial judge properly found that a taking had occurred, because the City's actions satisfied the first prong of *Agins*' disjunctive test — or it truncates

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7 "[I]t is undeniable that the only circumstance which necessitated the regulatory action was the adverse political climate . . . " (App., p. 113.) "[U]nder no circumstances can it be said that the public's health, safety and welfare were promoted by protecting the homeowners' view of the ocean and the light from the lighthouse." (App., p. 113.)

8 NIMBY — standing for "Not In My Back Yard" — is the popular acronym describing obstructionist individuals who obdurately oppose development of their neighbors' land.

9 Contrary to the cases cited *ante*, p. 9, fn. 6, Florida's courts have been clear that there can be no taking unless there is a denial of all economically viable use, regardless of whether the first prong of *Agins* is satisfied. (See *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So.2d 54, 58 [Fla. 1994]; *Department of Transp. v. Weisenfeld*, 617 So.2d 1071, 1073-1074 [Fla. App. 1993].)

this Court's rule[10] by holding that a taking can ***only*** occur when *Agins*' second prong is met — in which case the second trial judge properly found that a taking had occurred under federal law. In ***either*** event, Florida's appellate courts erred prejudicially. A taking should have been affirmed under *Agins* because the City's desires to satisfy a few influential citizens by preserving their harbor views did not rise to the level of "legitimate state interests," and did not justify saddling Yardarm with the multi-million dollar tab for that political favor.

Other courts have taken this Court's repeated affirmation of the first prong of *Agins* as showing that the rule is meant to be applied. (E.g., *A.A. Profiles v. City of Fort Lauderdale*, 850 F.2d 1483, 1487-1488 [11th Cir. 1988]; *Goss v. City of Little Rock*, 90 F.3d 306, 308 [8th Cir. 1996]; *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578-1580 [10th Cir. 1995].) Indeed, the Ohio Supreme Court recently acknowledged and corrected its error in misapplying *Agins*, and held forthrightly that "[s]atisfaction of either prong of the *Agins* test establishes a taking." (*State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345, 351 [Ohio 2002].) Florida cannot be allowed to deny its citizens constitutional protections announced by this Court and freely granted to citizens serendipitously living in other parts of the country.

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10 Compare *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 317 (1987) ["truncating" this Court's takings rules requires reversal].

## II

## FLORIDA DUE PROCESS LAW CONFLICTS WITH VIRTUALLY ALL COURTS BY HOLDING THAT ONLY CONSTITUTIONALLY CREATED RIGHTS RECEIVE DUE PROCESS PROTECTION — WHEREAS THIS COURT HAS REPEATEDLY HELD THAT PROPERTY RIGHTS ARE GENERALLY CREATED BY STATE LAW AND ARE NONETHELESS ENTITLED TO FEDERAL CONSTITUTIONAL PROTECTION.

A maverick rule has developed in the southeastern part of the country that only rights created by the U.S. Constitution receive substantive due process protection. The court below adopted an 11th Circuit opinion holding that "areas in which substantive rights are created ***only*** *by state law* . . . are not subject to substantive due process protection under the Due Process Clause because substantive due process rights are created ***only*** *by the Constitution.*" (App., p. 14; quoting *McKinney v. Pate*, 20 F.3d 1550, 1556 [1994] [*en banc*]; internal quotation marks omitted; emphasis added.)

The rule applied below is contrary to rulings settled here and applied by other courts. In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), this Court acknowledged that the Constitution protects, but does not create, property rights, holding that they "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as *state law.*" (Emphasis added.) (See also *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 279 [1943] [definition of property "normally obtain[s] its contents by reference to local law"]; *Sauer v.*

*New York*, 206 U.S. 536, 548 [1907].)[11] The Florida courts and the 11th Circuit are thus marching to the sound of a drummer that evidently only they can hear.

## III

## BY HOLDING THAT DUE PROCESS VIOLATIONS CAN ONLY BE COMMITTED BY AN *OFFICIAL* VOTE OF THE LOCAL LEGISLATIVE BODY, THE FLORIDA COURTS HAVE NOT ONLY DISREGARDED THIS AND OTHER COURTS' TEACHINGS, BUT HAVE CREATED A SITUATION IN WHICH MUNICIPAL LAWLESSNESS RULES.

It has long been settled that "The Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections." (*U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 [1995]; quoting *Lane v. Wilson*, 307 U.S. 268, 275 [1939].)

On whichever end of that jurisprudential spectrum the City's actions fall, the Florida courts upheld an outrageous course of governmental conduct on the ground that the City's charter says it can only act through "official legislative action," and here "the record does not show that

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11 For applications, see e.g., *Natale v. Town of Ridgefield*, 170 F.3d 258, 262 (2d Cir. 1999); *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 436 (4th Cir. 2002); *Bryan v. City of Madison*, 213 F.3d 267, 274 (5th Cir. 2000); *Littlefield v. City of Afton*, 785 F.2d 596, 605-607 (8th Cir. 1986); *Weinberg v. Whatcom County*, 241 F.3d 746, 753 (9th Cir. 2001); *Crown Point I, LLC v. Intermountain Rural Elec. Assn.*, 319 F.3d 1211, 1216 (10th Cir. 2003).

the Commission as a body adopted any official policy . . . opposing Yardarm . . . ." (App., pp. 18-19.)

In other words, as long as cities refrain from adopting official ordinances or resolutions laying bare their illegal intent on the public record, there has been no "official" action and cities can get away with whatever excesses in which they choose to indulge "unofficially."

That cannot be the law. And, in fact, it isn't — except in Florida.

This Court does not require such rigid formality to establish municipal liability. Thus, "it is when execution of a government's *policy or custom, whether by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy*, inflicts the injury that the government as an entity is responsible under § 1983." (*Monell v. Department of Social Services*, 436 U.S. 658, 694 [1978]; emphasis added.) This is so "even though such a custom *has not received formal approval* through the body's official decision making channels." (*Monell*, 436 U.S. at 690-691; emphasis added.) "Relying on the language of § 1983, the Court has long recognized that a plaintiff may be able to prove the existence of a *widespread practice* that, although *not authorized by written law or express municipal policy*, is so permanent and well settled as to constitute a custom or usage with the force of law." (*City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 [1988]; citations and internal quotation marks omitted; emphasis added.)

In support of *Monell*'s conclusion, Justice Brennan quoted Justice Frankfurter's conclusion for the Court emphasizing pragmatism over formalism: "It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. . . .

Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text." (*Monell*, 436 U.S. at 691, fn. 56, quoting *Nashville v. Browning*, 310 U.S. 362, 369 [1940].)

"Constitutional rights would be of little value if they could be . . . indirectly denied." (*Harman v. Forssenius*, 380 U.S. 528, 540 [1965]; quoting with approval.) "The Constitution measures a taking of property not by what a State says, or what it intends, but by what it *does*." (*Hughes v. Washington*, 389 U.S. 290, 298 [1967]; Stewart, J., concurring; emphasis in original.)

Other courts have applied *Monell*'s rule. (E.g., *DeCarlo v. Fry*, 141 F.3d 56, 61 [2d Cir. 1998] [plaintiff need not show "that the municipality had an explicitly stated rule or regulation . . ."]; *Bohen v. City of East Chicago*, 799 F.2d 1180, 1189 [7th Cir. 1986] [claim stated "even though such a custom has not received formal approval through the body's decision making channels."].)

This Court's focus on custom and policy was designed to draw a line between unauthorized acts of low-level municipal employees and matters that were either designed or encouraged or ratified by municipal decision-makers so that there would only be liability where "wrong could be ascribed to municipal decisionmakers." (*Oklahoma City v. Tuttle*, 471 U.S. 808, 821 [1985].)

There is no doubt that Yardarm fell victim to what the trial court found on ample evidence was "an ongoing discriminatory policy and practice of the City." (App., p. 89.) That policy, although not announced at any public meeting, was created by the City Commissioners and carried out by them and the highest ranking City officials: the Mayor, the City Manager, and the City Attorney. (App., pp. 55, 61, 62, 65, 73, 80.) Those people, in every

realistic sense, *were* the City government.[12] As the 7th Circuit put it in *Bohen*, a city is liable for actions reflecting its general policy when the decision-makers "even tacitly encourage[] conduct depriving citizens of their constitutionally protected rights." (799 F.2d at 1189; quoting with approval.) The City's actions at bench went far beyond *Bohen*'s "tacit approval" standard — they were quite overt. Besides, to the extent that some of the charged actions were made by formal City Commission action (e.g., permit revocations and new development standards [App. pp. 80]) they *were* official City actions by any standard.

The maverick rule of the southeast also appears in this context. Again relying on the 11th Circuit, the court below held that "substantive due process protects against arbitrary *legislative* action, not arbitrary *executive* action." (App., p. 17.) If outrageous government action harms only individuals, rather than "a larger segment of society," there can be no substantive due process violation. (App., p. 17.)

The idea makes no sense. The right to due process is an individual one, enshrined as such in the Bill of Rights, which protects *individual* rights. Arbitrary government action is usually aimed at individuals, rather than society as a whole. Besides, there is no such thing as "society" suing to secure redress from the courts for constitutional violations. It is invariably an individual plaintiff, or several plaintiffs, who complain that their

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12 "[T]he actions of the City of Pompano Beach were orchestrated by members of the highest legislative body of the City, involving bad faith and institutional bias which constituted legislative acts . . . ." (App., p. 89.)

individual rights have been violated. All the substantive due process cases cited in this Petition involved only a few plaintiffs. The defense has no more validity here then it did in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), when the village claimed a "class of one" could not assert an equal protection violation and this Court disagreed.

Florida's views conflict with other courts. (E.g., *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 139 [3d Cir. 2000] ["non-legislative government deprivation" raises due process claim on "allegations that the government deliberately and arbitrarily abused its power"]; *Scott v. Greenville County*, 716 F.2d 1409, 1419 [4th Cir. 1983] [bureaucrat's unjustified refusal to issue building permit states due process claim].)

Facts found at trial and not disapproved on appeal show the City's constitutional wrongs. The trial court: "After 12 years of prolonged litigation, stonewalling, and secret planning by the City Commissioners, with an admitted 'policy' to kill the Yardarm project, Yardarm ended up bankrupt and the City ended up with the property at a bargain price." (App., p. 84.)

If that is not a violation of a citizen's substantive constitutional rights, then what is? What could be?

## IV

## THERE IS CONFLICT AMONG LOWER COURTS AS TO WHETHER MANIFOLD DENIALS OF PROCEDURAL DUE PROCESS CAN BE CURED AUTOMATICALLY BY THE MERE AVAILABILITY OF JUDICIAL REVIEW.

Procedural due process springs from "an expectation that the system is fair and has provided an

adequate forum for the aggrieved to air his grievances." (*Weinberg v. Whatcom County*, 241 F.3d 746, 752 [9th Cir. 2001].) It is "important to organized society" (*Carey v. Piphus*, 435 U.S. 247, 266 [1978]) because it conveys a "feeling of just treatment" by the government (*Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 [1951] [Frankfurter, J., concurring]).

By contrast, the City ran Yardarm through the proverbial meat grinder. The City did not even pretend to comply with proper procedure. In the trial court's words:

> "There was no procedure to provide relief in a *meaningful time*. The City's abuse of the process for 15 years goes beyond the normal litigation path and far beyond the normal permitting delays. The City has constantly *abused* the very process which is theoretically designed to protect Yardarm (certiorari proceedings, declaratory judgment matters, etc." (App., p. 83; emphasis, the court's.)

—*Item*: City Commissioners held secret meetings to discuss plans to kill Yardarm's project.[13] As the trial court put it with wry understatement, Yardarm received no notice of the secret Sunday morning meetings of Commissioners Gomes and Flynn, the clandestine phone calls between Commissioners, or the directions to the Building Official to ignore court orders. (App., p. 83.)

—*Item*: The City Commission purported to hold hearings to repeal the ordinance authorizing Yardarm's 18-story hotel. Although plainly contrary to local law[14] as

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13 Florida law prohibits City Commissioners from discussing City business in private. (Fla. Stat. § 286.011.)

14 Fla. Stat. § 166.041(3)(c).

well as settled concepts of due process,[15] the City did that too without notice to Yardarm. (App., p. 74.)

—*Item*: The City repeatedly violated court orders to measure Yardarm's project against the rules in effect on Feb. 14, 1974. As the trial court found:

> " Instead of acquiescing to legitimate and well-reasoned court orders, the City deliberately disobeyed those orders, requiring Yardarm to resort again and again to additional lengthy, protracted and expensive lawsuits and appeals." (App., p. 83.)

The trial court rightly concluded that the City used litigation as a weapon. Thus, while Yardarm had access to "process," it wasn't "due process" but its antithesis: "The City's litigation tactics were funded by a seemingly unlimited litigation budget, unlike Yardarm which went deeper into debt and was ultimately subjected to foreclosure and bankruptcy. *No court could adequately address the harm which has befallen Yardarm during the litigation process.*" (App., p. 83; emphasis added.)[16]

But the Court of Appeal brushed such serious concerns aside: "Yardarm was afforded, and actually

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15 E.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

16 Fred Bosselman, dean of American land use lawyers, queried years ago whether land use regulation systems — even when operated cleanly and honestly — could become so complex that their complexity itself would deny due process. (Quoted in Donald Hagman & Dean Misczynski, Windfalls For Wipeouts 12 [Am. Soc'y of Planning Officials 1978].) *A fortiori*, when a municipality abuses the system like the City did here, due process is the first casualty.

utilized, full judicial procedures to challenge these administrative decisions." (App., p. 11-.) In other words, as long as Yardarm had access to endless, repetitive court proceedings that made no impact whatever on the City's conduct, and even that only *after the fact*, the City had *carte blanche* to violate all laws, secure in its belief that any judicial condemnation of its conduct could be ignored, thus forcing Yardarm to seek still more "process" that the City would again ignore. That is a "process" that would be more at home in the depressing fiction of Franz Kafka than in American constitutional jurisprudence.

Other courts find this impermissible. In *Westborough Mall, Inc. v. City of Cape Girardeau*, 794 F.2d 330 (8th Cir. 1986), the court addressed a conspiracy among city officials to rezone plaintiff's property so that a competing developer could proceed with his project. The district court instructed the jurors that, before finding that the city denied the plaintiffs procedural due process, they needed to "consider the fact that the plaintiffs could have petitioned a court of the State of Missouri" for relief. (794 F.2d at 337, fn. 6.) The 8th Circuit reversed, in analysis contrary to the Florida court at bench: "The availability of post-deprivation remedies is not a defense to the denial of procedural due process where predeprivation process is practicable. There are no reasons offered by the City nor can we perceive of any in this fact situation which would justify a denial of a predeprivation hearing." (794 F.2d at 337; citations omitted; see also *Weinberg v. Whatcom County*, 241 F.3d 746, 753-754 [9th Cir. 2001].)

Application of the *Westborough Mall* rule would have affirmed Yardarm's judgment. There was no reason here for not holding hearings when they were explicitly called for by law. Nor was there any excuse for the City Commissioners to skulk around in private making

decisions that ought to have been made, as required by law, at noticed, public hearings. This Court's own opinions hold steadfastly that the City should have provided and followed *its own process* "in the statutory or administrative procedure" before depriving Yardarm of its rights (see *Zinermon v. Burch*, 494 U.S. 113, 126 [1990], and *id.* at 127 [collecting numerous of this Court's cases]), rather than cynically violating Yardarm's constitutional rights and then saying, in effect, "sue me."

## V

## THERE IS A NEED FOR A DUE PROCESS REMEDY AGAINST GOVERNMENT ACTIONS THAT, ALTHOUGH FALLING SHORT OF TOTAL CONFISCATION, ARE ARBITRARY AND IRRATIONAL.[17] THE "ALL OR NOTHING" TAKINGS CLAUSE APPROACH OFTEN LEAVES PROPERTY OWNERS WITH NO REMEDY FOR SERIOUS DAMAGE CAUSED BY ARBITRARY AND CAPRICIOUS MUNICIPAL ACTIONS.

This Court has invoked the concept of substantive due process in land use cases to guard against municipal actions that are arbitrary and capricious. (E.g., *Nectow v.*

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17 We make this point *arguendo* on the premise of the adjudication below. In fact, as the trial court found — twice — this *was* a taking. Surely, when Yardarm lost its property by foreclosure because of the City's decade of hostile acts and the City then picked it up for pennies on the dollar paid to the FDIC, that had to be a taking.

*City of Cambridge*, 277 U.S. 183 [1928]; *Moore v. City of East Cleveland*, 431 U.S. 494 [1977].) The utility of substantive due process as an alternative to takings theory was endorsed by five Justices of this Court in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 (Kennedy, J., concurring), 554 (Breyer, J., four Justice dissent) (1998).

Some lower courts have followed this Court's lead. (E.g., *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 334 F.3d 796, 802 [9th Cir. 2003]; *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 124 [3d Cir. 2000]; *Herrington v. County of Sonoma*, 834 F.2d 1488, 1501, modified 857 F.2d 567 [9th Cir. 1987].)

The distinction between takings and due process was explained recently by Justice Breyer: "[A]t the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes 'private property' to serve the 'public' good." (*Eastern Enterprises*, 524 U.S. at 554; Breyer, J., dissenting.) The due process clause, of course, deals with arbitrary and unfair government actions.

In cases falling short of a taking, it is the process invoked by the government that itself causes severe injury, whether or not it reaches the level of a taking. As the 9th Circuit put it, in a related kind of case, but one that has absorbed only nine years so far, "Although the County has granted Nesbitt eleven development permits, his challenge is to the procedure he had to endure to get those permits. Even if the County relented today and issued all of the permits Nesbitt has applied for, he still would have been injured by the treatment he allegedly received and which caused him harm . . . ." (*Carpinteria*, 334 F.3d at 802.)

Without an alternative constitutional theory, property owners whose cases fall short of a taking can be

devastated — as the Stephanis brothers were here. They lost all they had but were left without a remedy. Such a result flies in the face of this Court's consistent jurisprudence since *Marbury v. Madison*, 1 Cr. [5 U.S.] 137, 163 (1803), when the Court concluded that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

More recently, this Court has acknowledged "our line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (*Reno v. Flores*, 507 U.S. 292, 302 [1993]; see also *Daniels v. Williams*, 474 U.S. 327, 331 [1986].)

Plainly, the actions of the City's Commissioners, Mayor, Manager, and Attorney, skulking around in secret and plotting to aid influential constituents by killing the Yardarm project, fail every word in that standard.

Unlike takings law, recovery for a substantive due process violation requires proof of arbitrary conduct resulting in damages, but not the complete destruction of the property's use or value. (*Bateson v. Geisse*, 857 F.2d 1300, 1303 [9th Cir. 1988]; compare *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 23-24 [Fed. Cl. 1999] [court complains that takings cases are "all or nothing" affairs].) Thus, where the source of the injury lies in the arbitrary actions of government, substantive due process is an appropriate analytical device for seriously damaged property owners to invoke. As this Court put it, substantive due process applies to intentional acts taken or

approved by government officials that infringe on protected rights through a deliberate and arbitrary abuse of power. (*Daniels v. Williams*, 474 U.S. 327, 331 [1986].)

This case is a prime illustration. If, for example, this Court were to agree with the Florida appellate courts that the City's actions did not rise to the level of a taking, there would still remain the question of compensation because of the outrageous conduct that was twice proved to the satisfaction of different fact finders.

Some courts — plainly at odds with Florida's — have applied an analysis akin to this Court's in *Daniels*. (E.g., *Del Monte Dunes at Monterey v. City of Monterey*, 920 F.2d 1496, 1508 [9th Cir. 1990] ["arbitrary and irrational" conduct yields liability]; *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 249-252 [5th Cir. 2000] ["blatant governmental interference with property rights" yields liability]; *Burrell v. City of Kankakee*, 815 F.2d 1127, 1129 [7th Cir. 1987] ["arbitrary or irrational" conduct yields liability].)

And yet, notwithstanding the views of this Court's members, some lower courts have demonstrated hostility to permitting land owners even to ask for this remedy. As the 6th Circuit put it a decade ago, "[t]he lack of uniformity among the circuits in dealing with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable." (*Pearson*, 961 F.2d at 1217.) The situation has remained in remarkable conflict.

The Florida courts, as noted, adopted a maverick 11th Circuit position and imposed two restrictions on due process recovery that cripple it almost beyond invocation: the right must arise from the U.S. Constitution, and it must be violated by express, formal action of a municipality's legislative body. Those requirements will probably never be met. As discussed earlier, property rights are not

created by the U.S. Constitution, which only protects them after they come into being under state law, and legislative bodies are not likely either to adopt unlawful conspiratorial programs or to confirm unlawful conduct by formal resolution or ordinance.[18]

The 1st Circuit has also held that substantive due process is virtually unavailable in land use disputes, saying it has only "left the door *slightly ajar* for federal relief in *truly horrendous situations.* But . . . the threshold for establishing the requisite 'abuse of governmental power' is a *high one* indeed." (*Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32 [1st Cir. 1992]; emphasis added.)

Even the 3d Circuit, a court that has been receptive to substantive due process claims in the past,[19] recently increased the burden on land owners by changing the standard for such a claim from proof of "improper motive" to proof of actions that "shock the conscience." (*United Artists v. Township of Warrington*, 316 F.3d 392, 400 [3d

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18 As the California Supreme Court once put it, "it is the essence of a conspiracy . . . to operate in secrecy and not in the open light of day or in public meetings . . . ." (*American Civil Liberties Union v. Board of Educ.*, 55 Cal.2d 167, 178, 359 P.2d 451 [1961].) See also this Court's discussion of the difficulty in obtaining direct evidence of a municipality's illegal, racially discriminatory intent in *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-268 (1977).

19 See, e.g., *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988); *DiBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592 (3d Cir. 1995); *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118 (3d Cir. 2000).

Cir. 2003].) Although Petitioner believes that the actions of the City at bench were sufficiently outrageous to "shock the conscience," the deliberate use of such a standard outside the context of the kinds of police actions in which it was formed[20] seems designed to reduce the constitutional protection available to landowners to the level of the 1st Circuit's "truly horrendous" rule, i.e., essentially never.

Thus, even as the majority of this Court has recognized a proper place for the use of a substantive due process analysis, some lower courts have taken it upon themselves to move in an opposite direction. That is anomalous, and warrants corrective action by this Court.

As a noted treatise put it, this Court's recent decisions demonstrate "the need for meaningful substantive due process." (Steven J. Eagle, Regulatory Takings, § 12-2, p. 977 [2d ed. 2001].) By that, Professor Eagle meant that the courts should use the due process concept in tandem with regulatory takings law so that land owners whose property has not been *de facto* confiscated, but who are *seriously* injured by improper government action — like Yardarm —have a fair chance at redress under standards that do not unduly favor the government. (*Id.* at § 12-2[b], pp. 979-981.) Standards, in other words, that recognize the fundamental nature of the right to use

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20 *Rochin v. California*, 342 U.S. 165 (1952) [forced stomach pumping]; *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) [high speed car chase through residential neighborhood]. See *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992): "Applying the 'shocks the conscience' test in an area other than excessive force . . . is problematic."

one's property, thus subjecting the regulation to a higher standard of review. (Compare *Nollan*, 483 U.S. at 833-834, fns. 2 and 3.)

The lower courts, however, are adrift; disagreement among them is rife, and some are openly hostile to the applicability of such an approach. If relief is to come, it must come here.

## CONCLUSION

There is confusion and conflict on how — or even whether — to apply this Court's settled regulatory taking test from *Agins*. Indeed, the Florida Court of Appeal, in refusing to apply *Agins*, criticized this Court's decisions in *Agins* and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), among others, as the source of "confusion on this issue." (App., p. 37, *Id.* at fn. 9.) Plainly, this Court is not confused. It has steadfastly reiterated its *Agins* rule (see *ante*, p. 9, fn. 6), and has repeatedly shown its adherence to *Penn Central*. (E.g., *Tahoe-Sierra*, 535 U.S. at 326 *et seq.*; *Eastern Enterprises*, 524 U.S. at 523-524 [O'Connor, J., plurality opinion]; *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 [2001]; O'Connor, J., concurring.) It is unseemly for a state appellate court to charge this Court with creating "confusion" when this Court has steadily announced its intent to retain the same standards it has used for years. Some lower courts, however, plainly are confused, and they — along with those who litigate in them — need this Court's help.

The same is true of substantive due process. Although it cannot displace takings law, because the concepts are designed to deal with different kinds of

governmental action and different kinds of harm inflicted on the aggrieved citizen, there is a place for substantive due process review of municipal treatment of property owners. Here, too, the track record developed in the lower courts shows that it is time for this Court to intervene. The "law" is in such confusion that constitutional protection literally depends on what state one lives in. That cannot go on.

The hazards of this legal conflict and confusion are demonstrated by what happened in Pompano Beach. The treatment meted out to Jim and Tom Stephanis by the highest ranking officials of that City was outrageous by any measure. Every trial judge who examined the facts so found and ordered the City to stop. But the City kept on. Even the two appellate opinions reversing judgments against the City did not dispute the facts — indeed, each cited or quoted heavily from the trial court's findings. (See App., pp. 3-8, 32-35.) Rather, they held that, in spite of the facts, the law provided no relief.

With respect, they were wrong. Decisions from this Court and other courts demonstrate that. Nonetheless, Florida's law is hopelessly in conflict with other jurisdictions.

But if the Court of Appeal was right, then this Court's attention is needed even more. If the Court of Appeal was right, then protections and guarantees embedded in the 5th and 14th Amendments are no more than paper shields against real governmental tigers. The Constitution deserves better. So do the citizens of this Nation.

Yardarm prays that certiorari be granted so this Court can explicate the constitutional protections inherent in the guarantees against taking private property without

just compensation and without either procedural or substantive due process of law.

Respectfully submitted,

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District Court of Appeal of Florida,
Fourth District.

The CITY OF POMPANO BEACH, Appellant,
v.
YARDARM RESTAURANT, INC., Appellee.

**Nos. 4D99-977, 4D00-591 and 4D00-2499.**

Oct. 9, 2002.
Rehearing Denied Feb. 4, 2003.

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*TAYLOR*, J.

This case concerns § 1983 due process claims by a developer against a city for obstruction and delay in the issuance of building permits for construction of a hotel and marina on the developer's property. The City of Pompano Beach ("City") appeals a judgment holding it liable for violation of substantive and procedural due process rights of Yardarm Restaurant, Inc. ("Yardarm"). The City also appeals, and Yardarm cross-appeals, the award of damages, attorney's fees, and costs. We have consolidated these cases for review.

## *I. BACKGROUND*

In *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So.2d 1377 (Fla. 4th DCA 1994) ("*Yardarm I*"), we reversed a judgment finding the City liable for inverse condemnation of property owned by Yardarm. The judgment was based on the trial court's finding that the City's history of obstructing the issuance of Yardarm's permits for a hotel and marina effected [sic] a permanent taking of its property. In reversing, we concluded that Yardarm failed to establish a "taking," because the City did not deprive Yardarm of substantially all use of its property. *Id.* at 1384-87. We further ruled that any "taking" claim was barred by the statute of limitations. *Id.* at 1388.

We observed, however, in *Yardarm I* that the facts found by the trial court might support a claim for a due process violation under 42 U.S.C. § 1983. Accordingly, we remanded the case for reconsideration of the summary disposition of appellee's due process claim. *Id.* at 1389. We expressly declined to rule on the merits of a due process claim on the record then before us. *Id.* at 1389.

On remand, the trial court reinstated Yardarm's due process claim and the case proceeded to trial in 1998. The court held a non-jury trial on the issue of liability and bifurcated the damages portion. Following a two-week trial, the court found that the City violated Yardarm's procedural and substantive due process rights by its obstructionist conduct in connection with Yardarm's application for building permits. The court ruled alternatively that the City effected [sic] a federal taking of Yardarm's property. After determining that recovery was not barred by the statute of limitations because of the

"continuing violation" doctrine, the court entered a liability judgment for Yardarm.

Thereafter, a jury returned a verdict assessing damages against the City in the amount of $7,601,920. The trial court later entered a final judgment for damages totaling $19,203,491, which included its calculation of prejudgment interest through the verdict. The court also awarded attorney's fees and costs to Yardarm. The City appealed both the final judgment on damages and the attorney's fee and cost award. Yardarm cross-appealed portions of both and sought clarification on the post-judgment interest.

## *II. THE 1998 TRIAL*

During the liability phase of the second trial, Yardarm presented numerous witnesses and exhibits to prove that the City willfully obstructed the development of its hotel project from 1973 through 1981 and that its conduct resulted in Yardarm's inability to obtain financing for its expansion plans, ultimately causing Yardarm to lose its property through foreclosure. In addition to presenting much of the evidence from the first trial, Yardarm introduced some new evidence relating to the unofficial "policy" of the Commission and secret meetings and discussions among City officials about plans to repeal the special exception.

Yardarm, which was owned by James and Thomas Stephanis, had operated a successful restaurant in Pompano Beach since 1959 on the east side of its property overlooking the Hillsborough Inlet. In 1972, Yardarm decided to build an eighteen-story hotel tower and marina on this site (the "East Side"). Shortly after its plans

became known, political opposition to the hotel began to mount. The Hillsboro Shores Improvement Association ("Association"), a homeowners group located on the south side of the inlet, objected to the hotel's construction because it would block their view of the ocean and the lighthouse at the inlet. The local Pompano Beach Republican Club was also an active opponent of the project.

On May 1, 1973, before Yardarm applied for a building permit for its East Side project, the City enacted an ordinance imposing a ten-story height restriction on new buildings in the city. In response, Yardarm applied for a special exception to construct its eighteen-story hotel. On October 2, 1973, the City passed Ordinance No. 73-96, which granted Yardarm a special use exception for the project. The Association vigorously opposed the special exception and filed suit to set it aside. Ultimately, the circuit court upheld the special exception, finding that the Hillsboro Shores residents had no legal right to unobstructed views of the lighthouse and inlet.

On February 8, 1974, Yardarm applied for a building permit. The Building Official, Walter C. Williams, issued the permit on February 14, 1974. However, four days later, the Building Official revoked the permit, citing noncompliance with applicable codes and regulations, failure to obtain necessary approvals from other regulatory agencies, the existence of an easement on the property, and certain deficiencies in the application and plans, including inadequate parking spaces.

Yardarm responded by filing suit against the City for re-issuance of the permit. This litigation resulted in an order that acknowledged the City's right to rescind the permit but ruled that Yardarm could apply for a new

permit upon plans that complied with the building and zoning laws in effect on February 14, 1974, the date the permit was originally issued, together with approvals from the regulatory agencies required by the City at that time.

In February 1977, after the City denied Yardarm's re-application for a building permit because of inadequate parking spaces, Yardarm sought supplemental relief from the circuit court. The court ruled in Yardarm's favor, reiterating that the "February 14, 1974 regulations apply." On March 15, 1977, the day following the court's ruling, Yardarm was issued a new building permit.

In April 1977, having finally resolved the parking issues and obtained the permit for its hotel, Yardarm closed its restaurant and demolished the building. At the time, the restaurant was free and clear of any encumbrances or mortgages and had just experienced its most profitable year. Though Yardarm needed permanent financing to build the East Side project, it proceeded with preliminary site work.

Soon thereafter, Yardarm became aware that its new permit issued in 1977 did not include the seawall, dock, and quays that had been included in the former, revoked permit. Yardarm continued site preparation while filing for approval of the seawall and docks. The City ultimately approved the seawall, but refused a permit for the docks, as did the board of appeals. In January 1978 Yardarm sought supplemental relief from the circuit court. Almost a year later, following trial, the parties stipulated to an order which permitted Yardarm to build a dock and directed the City to give the Corps of Engineers any required written assurances. However, when Yardarm sought approval from the Corps of Engineers for construction of

the dock, the City Manager wrote the Corps opposing the dock permit and demanding a public hearing if the Corps was undecided on the matter.

The Corps eventually issued the dock permit. However, in July 1979, while the matter was still pending, the City determined that Yardarm's building permit had lapsed because there had been no construction on the site for ninety days. This determination was based on a recently enacted rule that litigation between the parties would not toll work requirements. Yardarm went to court, again contending that the applicable rules were those in place in 1974, when it first applied for a permit. Ultimately, in July 1981, after an appeal to this court, the Yardarm's permit was reissued.[1]

In the meantime, construction costs increased dramatically from $5 million to over $9 million. Hoping to make the project more attractive to institutional lenders and obtain a management contract with a major hotel chain, Yardarm decided to expand the project. In February 1981, Yardarm purchased a second parcel, west of the property Yardarm already owned (the "West Side"). To finance this additional land, Yardarm mortgaged the East Side parcel. Yardarm then abandoned the East Side project and redrew plans for a completely different hotel project on both the East and West Sides (the "East/West Project").

Yardarm sought financing for the expanded project. One potential deal turned out to be a scam that cost

[1] This permit remained in effect well into 1985, until it again lapsed due to lack of progress.

Yardarm $205,000. Because Yardarm had been required to take on a partner, it continued to seek a loan which would fully compensate it up front for the value of property and its costs – a total of about $6 million. Yardarm received two substantial offers to buy its stock in 1983: one for $4.25 million and one for approximately $8 million. Yardarm rejected the first offer, and the second offer was withdrawn when the offeror discovered that Yardarm had given someone else an option to buy the property. Meanwhile, to fund enough construction on the existing project to prevent the permit from lapsing, Yardarm took out a number of short term loans. The last of these was a $2.8 million loan obtained in January 1984 from Sunrise Savings and Loan Association.

During this time, Yardarm obtained "B-2" plan approvals from the City's Planning Department for the West Side project from 1981 through 1984. However, Yardarm never took the next step of applying for a building permit for the West Side before Sunrise filed for foreclosure on May 8, 1985. The foreclosure proceedings caused the work to stop, and the permit for the East Side project lapsed due to lack of progress. The Building Official informed Yardarm that it could get the permit reinstated if it re-filed plans within 180 days, or by October 30, 1985. Rather than apply for reinstatement of the permit, Yardarm submitted new plans for preliminary site plan review of its East/West project.

Around the time that the building permits for the East Side project elapsed, the City began to consider repealing the ordinance which granted Yardarm the special use exception to build its 18-story hotel. The ordinance was given its first reading on September 3, 1985. A second reading was scheduled for October 29,

1985. On October 10, 1985, Yardarm submitted a consolidated plan for a project on both the old and the new parcels. When it learned of the prospective repeal of the special exception ordinance, and with the deadline for permit reinstatement about to run, Yardarm filed suit for an injunction against the repeal. The injunction was granted on November 20, 1985.

The City appealed from the injunction. In July 1987, we ruled in favor of the City in its appeal from the order enjoining it from repealing the eighteen-story ordinance. *City of Pompano Beach v. Yardarm Restaurant, Inc.* 509 So.2d 1295 (Fla. 4th DCA 1987). We held, *inter alia*, that the City was not estopped from revoking the ordinance, notwithstanding the City's purported obstructionist tactics, because Yardarm had failed to make any real effort to construct the building during the period following cessation of any obstructionist activity. *Id.* at 1297.

By February 26, 1986, when Yardarm received tentative approval for its consolidated plan on both parcels, a final judgment of foreclosure had already been entered on the properties. A foreclosure sale was set for March 21, 1986. On March 4, 1986, the City gave Yardarm site approval, with 180 days to obtain a building permit. Yardarm filed for bankruptcy protection. The bankruptcy stay was subsequently lifted and the property was sold in foreclosure to FSLIC, as receiver for Sunrise. Years later, the City purchased the land from FSLIC at auction.

## *III. FEDERAL TAKINGS CLAIM*

In addition to trying appellee's § 1983 due process claims at the 1998 trial, the trial court reinstated the federal takings claim.[2] In *Yardarm I*, we had reversed the trial court's finding that the City, through its conduct in obstructing the issuance of Yardarm's permit, had effected [sic] a permanent taking of Yardarm's property under the state constitution. 641 So.2d at 1387. We ruled that the facts did not support a takings claim because Yardarm was not deprived of substantially all use of its property. *Id.* at 1384-86.

Our holding, in addition to being the law of the case with respect to the state law takings claim, was issue preclusion, or *res judicata*, on Yardarm's federal takings claim under the United States Constitution and § 1983. Because this claim is identical to the state claim previously adjudicated by this court, the trial court erred in concluding that a taking had occurred. *See Brunner Enters., Inc. v. Dep't. of Revenue,* 452 So.2d 550, 552 (Fla.1984) (citing *Greene v. Massey,* 384 So.2d 24 (Fla.1980) (discussing that, except in extraordinary circumstances, all questions of law which have been decided by the highest appellate court become the law of the case, which must be followed in subsequent proceedings)); *see also Treister v. City of Miami,* 893 F.Supp. 1057, 1067 (S.D.Fla.1992) ("We have no doubt that the issues raised by a claim for a

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[2] A footnote in the Liability Determining Judgment stated the judge's belief that the facts presented at trial supported judgment for Yardarm not only on its due process claims, but also on the takings claim, as alternative relief, based upon principles not addressed by our court in *Yardarm I*.

taking, and the elements of the claim, under the Florida Constitution, are sufficiently similar to the parallel claim under the United States Constitution so as to constitute identical claim for *res judicata* purposes, and that the issues necessarily litigated therein are sufficiently identical for issue preclusion purposes.").

## *IV. PROCEDURAL DUE PROCESS*

The trial court concluded that the City's actions in delaying and obstructing Yardarm's attempts to obtain building permits violated both Yardarm's procedural and substantive due process rights. The City urges reversal of the ruling with respect to procedural due process, contending that the 1998 trial proceeded only on Yardarm's substantive due process claim. The City points out that in the eleven-year history of this case, Yardarm never asserted a procedural due process claim in any of its pleadings, nor litigated a procedural due process claim during the trial.[3] The City further argues that even if a procedural due process claim had been properly pled or tried, such claim should still fail because: (1) Yardarm was not deprived of

[3] When the § 1983 claim was reinstated, counsel for Yardarm stated in open court: "Count II. That's what we're here on . . . substantive due process . . . under 1983 . . . this is substantive due process . . . what we've got is not a taking." Then at the pretrial conference, just two months before the 1998 trial, the trial court confirmed that "[Yardarm]'s going to proceed on the theory of breach of substantive due process. . . . As encompassed in 42 U.S.[C.] 1983. Yardarm does not dispute the City's charge that in the 3,153 pages of transcript covering the ten days of trial and numerous arguments of counsel, there is no mention whatsoever of "procedural due process."

any property right; and (2) even if it had been, the City provided Yardarm with all the process it was due.

Yardarm responds that it is irrelevant that it failed to use the words "procedural due process" in its pleading or at trial; that evidence of the City's actions on its building permits without advance notice or hearing, pattern of dilatory litigation, and secret discussions on repeal of its special use exception established procedural due process violations. We disagree.

As the trial court recognized, procedural due process prevents the government from depriving a person of a significant property interest without due process of law. *See First Assembly of God of Naples, Fla., Inc. v. Collier County,* 20 F.3d 419, 422 (11th Cir.1994). Here, Yardarm has not shown any procedural due process violations. With respect to actions taken by the Building Official on Yardarm's building permit applications, Yardarm was afforded, and actually utilized, full judicial procedures to challenge these administrative decisions. *See, e.g., Boatman v. Town of Oakland,* 76 F.3d 341 (11th Cir.1996) (holding that property owners' civil rights action against a town for its refusal to issue them a certificate of occupancy did not fall under the procedural component of § 1983 because the state provided them all the process they were due, i.e., the right to repair to the circuit court and seek an order compelling a final inspection).

With respect to the City's attempts to repeal Yardarm's special use exception, Yardarm could and did seek an injunction in the circuit court. Moreover, since the ordinance to repeal the special exception was never actually enacted, Yardarm's special exception was never repealed. Hence, assuming, for the sake of argument, that

Yardarm had an interest in the special exception, it was never deprived of it.

## *V. SUBSTANTIVE DUE PROCESS*

Yardarm's substantive due process claim under § 1983 is predicated upon its claim of a vested property right in the building permits that the City improperly withheld, revoked, and delayed. Essentially, Yardarm asserts a constitutionally protected property right in the building permits arising from its change of position or expenditure of large sums of money in reliance on them and based on its position that the City lacked discretion to deny the permits. The trial court agreed that Yardarm had a federally protected interest in the building permits and found that the City acted arbitrarily and in bad faith for political and personal reasons in the permitting process. Based on these findings, the court concluded that Yardarm's substantive due process rights were violated and entered judgment for Yardarm.

The City seeks reversal of the judgment, arguing that Yardarm had no substantive due process protection in its building permits.[4] The City asserts that Yardarm's

[4] The City disputes that Yardarm legally had any vested rights in its building permits, noting that "Florida law since 1945 had been clear that [p]ossession of a building permit does not create a vested right . . ." *City of Boynton Beach v. Carroll,* 272 So.2d 171, 173 (Fla. 4th DCA 1973). It further argues that Yardarm did not have a vested right factually, because we found that the record does not "demonstrate such a change in position as to justify the application of equitable estoppel in this case." *City of Pompano Beach v. Yardarm Restaurant, Inc.,* 509 So.2d 1295, 1298 (Fla. 4th DCA 1987). Finally, the City asserts that, assuming *arguendo* that Yardarm had a vested right in its permit, the

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purported property rights in these permits, even if vested, were state created property rights, which do not enjoy substantive due process protection under § 1983. It points out that the cases mainly relied upon by Yardarm and the trial court, *Reserve, Ltd. v. Town of Longboat Key,* 17 F.3d 1374 (11th Cir.1994), and *Corn v. City of Lauderdale Lakes,* 771 F.Supp. 1557 (S.D.Fla.1991), are no longer good law, having been overturned by *McKinney v. Pate,* 20 F.3d 1550 (11th Cir.1994) (en banc), *cert. denied,* 513 U.S. 1110, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995), and *Sullivan Prop., Inc. v. The City of Winter Springs,* 899 F.Supp. 587 (M.D.Fla.1995).

In the *Reserve* case, the developer sued the Town of Longboat Key for revoking its building permit. On remand from the Eleventh Circuit Court of Appeals, the federal district court granted the town's motions for summary judgment as to the developer's substantive due process claims. The court referred to the Eleventh Circuit's holding in *McKinney v. Pate,* stating:

> Attempting to correct our circuit's jurisprudence regarding the Fourteenth Amendment's Due Process Clause, *McKinney* holds that Section 1983 substantive due process claims arising from non-legislative deprivations of state-created property interests are no longer cognizable. Contrary to the plaintiffs' suggestion, the effect of *McKinney* extends beyond employment disputes. At least one other district court has applied

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record demonstrated that it abandoned any such right. *Id.* at 1297 (finding that the City's alleged obstructionist activities ceased after July 1979, and Yardarm failed to make any real progress on construction of the hotel in the intervening years).

> *McKinney* to a substantive due process claim involving a building permit. . . .
>
> First, the purported property interest (i.e., Reserve's interest in the revoked building permit) is created by state law and falls comfortably short of a fundamental right . . . Second, both the issuance and revocation of the building permit constitute "executive" and not "legislative" acts. Whether rendered by Longboat Key's legislative body or executive branch (e.g. its public works director and town manager), both decisions affect only a small group of individuals and not the general population. Accordingly, *McKinney* precludes Reserve's asserting a substantive due process claim based on the revocation of its building permit.

*Reserve,* 933 F.Supp. 1040, 1043-44 (M.D.Fla.1996) (footnotes and citations omitted).

In *McKinney,* which involved a wrongful termination case brought by an employee against a public employer, the Eleventh Circuit distinguished between procedural and substantive due process claims in the context of state-created rights and clarified that:

> The substantive component of the Due Process Clause protects those rights that are "fundamental," that is, rights that are "implicit in the concept of ordered liberty" . . . [A]reas in which substantive rights are created only by state law . . . are not subject to substantive due process protection under the Due Process Clause because "substantive due process rights are created only by the Constitution." As a result, these state law based rights constitutionally may be rescinded so long as the elements of procedural-not substantive – due process are observed.

20 F.3d at 1556 (quoting *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937), and *Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 229, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985)) (citations omitted).

Other courts have also extended *McKinney* beyond employment disputes and applied it in land use cases.[5] However, in this case, the trial court found *McKinney* inapplicable. In its Judgment Determining Liability, the court wrote that the "rights involved in this case are more fundamental than mere employment interests." Further, the court rejected the City's position that the acts Yardarm complained of were "executive," rather than legislative. The court distinguished this case from those involving "run-of-the-mill" administrative acts and ruled that this case involved legislative acts, "egregious and deliberate acts orchestrated by members of the highest legislative body of the city, under extreme circumstances involving bad faith and institutional bias."

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[5] *See Baggs v. City of S. Pasadena,* 947 F.Supp. 1580 (M.D. Fla.1996); *Jacobi v. City of Miami Beach,* 678 So.2d 1365, 1366-67 (Fla. 3d DCA 1996); *Kantner v. Martin County,* 929 F.Supp. 1482, 1486- 87 (S.D.Fla.1996), *aff'd,* 142 F.3d 1283 (11th Cir.1998); and *Boatman v. Town of Oakland,* 76 F.3d 341 (11th Cir.1996); *see also Ammons v. Okeechobee County,* 710 So.2d 641, 645 (Fla. 4th DCA 1998) (applying *McKinney* and holding that a decision to revoke an unlawfully issued occupational license did not strike at fundamental rights under the constitution and thus did not violate substantive due process rights under § 1983); *Paedae v. Escambia County,* 709 So.2d 575 (Fla. 1st DCA 1998) (applying *McKinney* and holding that the interpretation of the zoning code which disallowed the use of appellants' property in one particular manner was not a legislative action, but rather in the nature of a denial of a development permit, which would not support a federal action for damages under § 1983 because a property owner has no protectable property interest in a building permit under Florida law).

Specifically, the court determined that the City engaged in unreasonable, protracted litigation; repeatedly ignored court orders to apply the February 14, 1974 regulations to Yardarm's permit applications; and engaged in stonewalling tactics to block the Yardarm project. The court set out in detail the actions taken by various City officials and employees on Yardarm's building permits and special exception. In concluding that these actions represented an official policy, custom, or practice of the City, the court noted the testimony of a City Commissioner, Emma Lou Olsen, that, several commissioners had an "unstated policy to kill the Yardarm project."[6] In addition, the court referred to testimony concerning secret meetings between two commissioners held on Sunday mornings to discuss Yardarm, testimony that certain City officials directed and/or interfered with the activities of the Building Official, and interoffice memos between non-elected City officials concerning plans to repeal the 18-story special exception.

The City argues that, even assuming that these acts occurred, the substantive due process claim fails as a matter of law, because no evidence was presented that the acts were done in a legislative, rather than an executive capacity.

According to *McKinney,* the distinction between "legislative" and "executive" acts is key in the substantive

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[6] Olsen testified that several commissioners made derogatory remarks about Yardarm in private conversations outside of City Commission meetings and seemed to have "a policy of stopping anything that Yardarm was doing."

due process analysis. *McKinney* explained that substantive due process protects against arbitrary legislative action, not arbitrary executive action. *See Williams v. Goldsmith,* 905 F.Supp. 996, 1000 (M.D.Ala.1995). It observed that executive acts characteristically apply to a limited number of persons – often to just one person – and typically arise from the ministerial or administrative activities of members of the executive branch, whereas "legislative acts" generally apply to a larger segment of society, if not to the entire society. *McKinney,* 20 F.3d at 1557 n. 9.

For Yardarm to prevail under *McKinney* on its substantive due process claim under 42 U.S.C. § 1983, it had to show that the governmental activities in this case constituted "legislative" conduct. Based on our review of the record, we conclude that Yardarm failed to establish that the acts for which it claimed damages were legislative, rather than executive acts. The evidence shows that these acts were done by various City employees and administrators applying existing rules and ordinances specifically to Yardarm, not by the Commission as a body enacting legislation and policy decisions affecting the general public.[7] *See Reserve,* 933 F.Supp. at 1043-44

[7] Yardarm's first permit was revoked in 1974 by Walter C. Williams, Building Official, as instructed by John Cartwright, the City Manager, chief executive officer and head of the administrative branch of the City government. Williams also revoked a second permit due to lack of work on the project. Subsequent reviews of Yardarm's building permit applications were done by Williams' successor, Eugene Guydosik, Fred Peterson, Assistant Planning Director, Fred Kleingartner, Planning Director, and Regan Yarbrough of the Planning Department and Planning and advisor to the Planning and Zoning Board. The City Engineer, Richard Mills, rendered advice concerning application for the

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(concluding that whether rendered by a legislative body or the executive branch, e.g., a public works director and city manager, decisions affecting only a small group of individuals and not the general population constitute executive and not legislative acts). Yardarm did not present any evidence that the City Commission or a City official with "final policy-making authority" acted against Yardarm, and that such action was taken pursuant to a policy adopted by the City Commission.[8] The acts complained of consisted of delays in issuing building permits, wrongful revocation of building permits, delays in B-2 Reviews, and an attempted repeal of a special exception. The record is devoid of any evidence that adverse actions taken on Yardarm's permits by the administrative officials, such as the Building Official, City Manager, and other department heads and employees, were directed or required approval by the City Commission. *See Reserve,* 933 F.Supp. at 1043-44 (M.D.Fla.1996) ("[B]oth the issuance and revocation of the building permit constitute 'executive' and not 'legislative' acts."); *Raben-Pastal v. City of Coconut Creek,* 573 So.2d 298 (Fla.1990) (holding that building official did not possess the type of policy-making authority that would make city liable under 42 U.S.C.A. § 1983 for his decision

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dock permit. The City Attorney and City Manager were involved in matters concerning the drafting of an ordinance to repeal Yardarm's special exception.

[8] The City presented evidence that, under the City Charter, "all powers of the city and the determination of all matters of policy [are] vested [solely] in the Commission." § 10, City Charter. Thus, only the City Commission can set policy, and it can do so only through a duly enacted ordinance or resolution. In Florida, an ordinance is the "official legislative action of a governing body, which action is a regulation of a general and permanent nature and enforceable as a local law." § 166.041(1)(a), Fla. Stat. (1983).

on stop work order on developer's project). Further, the record does not show that the Commission as a body adopted any official policy, custom, rule, resolution, or ordinance opposing Yardarm or made a final vote on any permit, site plan, or variance concerning the Yardarm property. In fact, the only land-use decision which the City Commission ever made as a body with respect to Yardarm's project was the *granting* of the special exception, which made the project possible.

## *IV. CONCLUSION*

In sum, Yardarm may not recover for damages under its federal substantive due process claim that the City denied or delayed its building permits for improper reasons. Applying *McKinney* to the facts of this case, we conclude, as a matter of law, that the developer had no cognizable substantive due process claim because its property interest in the building permits was created by state law, not the Constitution, and both the issuance and revocation of the building permits constituted executive and not legislative acts. Further, as discussed above, Yardarm received such procedural due process as was due. Accordingly, we reverse the Judgment Determining Liability in its entirety, rendering the appeal and cross-appeal on damages, attorney's fees, and costs moot. We remand with instructions to enter judgment in favor of the City of Pompano Beach.

REVERSED AND REMANDED.

*STEVENSON*, J., and OWEN, WILLIAM C., JR., Senior Judge, concur.

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33402**

February 4, 2003

**CASE NO.: 4D99-977**
**4D00-591 4D00-2499**
L.T. No. : 87-19652 18

CITY OF POMPANO BEACH v. YARDARM RESTAURANT, INC.

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Appellant/Petitioner(s), Appellee/Respondent(s).

**BY ORDER OF THE COURT:**

ORDERED that appellee's motion filed November 14, 2002, for rehearing, rehearing *en banc* and to certify questions of great public importance is hereby determined to be moot; further,

ORDERED that appellee's motion filed November 15, 2002, to file appellee's corrected motion for rehearing, rehearing *en banc* and to certify questions of great public importance is hereby granted; further,

ORDERED that appellee's corrected motion filed November 15, 2002, for rehearing, rehearing *en banc* and to certify questions of great public importance is hereby denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

Henry Latimer
Margaret L. Cooper
Caran L. Rothchild
Jane Kreusler-Walsh

Randolph W. Adams
Frank Shepherd

ch (SEAL)

/s/ Marilyn Beuttenmuller
MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal

641 So.2d 1377

District Court of Appeal of Florida,
Fourth District.

CITY OF POMPANO BEACH, Appellant,
v.
YARDARM RESTAURANT, INC., Appellee.

**No. 91-1829.**

Sept. 9, 1994.

Henry Latimer of Eckert, Seamans, Cherin & Mellott, Fort Lauderdale, for appellant.

Gale Ciceric Payne and James C. Pilkey of Payne, Pilkey & Assoc.; Earl Faircloth and Randolph W. Adams, Fort Lauderdale, for appellee.

*GRIFFIN*, J., Associate Judge.

This is the appeal of a non-final order[1] in a non-jury action finding the City of Pompano Beach ["Pompano Beach" or "City"] liable for the inverse condemnation of property owned by the Yardarm Restaurant, Inc. ["Yardarm"]. We reverse because the record fails to establish the requisite taking and because any "taking" claim would be time barred.

Yardarm, which was held in equal shares by brothers Jim and Tom Stephanis, had operated a successful restaurant[2] in Pompano Beach from 1959 until 1972 on a parcel of land that overlooked the Hillsborough Inlet with a view

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[1] The damage issue has yet to be tried.

[2] The restaurant was consistently named one of Florida's best. In 1976-1977, its final year of operation, it grossed more than $1,000,000.

of the Hillsborough Inlet lighthouse [the "east parcel"]. In 1972, Yardarm decided to make a more profitable use of its property by building a European-style grand hotel and marina on the property. Yardarm's initial plans, which called for an eighteen story, 165 room hotel and marina, were submitted for approval to Pompano Beach in February 1973.

Yardarm's plans were met with vigorous public opposition, especially from a condominium association across from the Yardarm which feared that the hotel and marina would block its members' view of the inlet and lighthouse. In apparent response to the opposition, on May 1, 1973, the Pompano Beach commission passed an ordinance imposing a ten-story height restriction on new buildings in Pompano Beach.

Yardarm applied for an exception to the ordinance, and despite continued opposition to the plan, on October 2, 1973, Pompano Beach passed ordinance number 73-96, which had the effect of granting a special use exception to Yardarm allowing the construction of an eighteen story hotel. Yardarm received a building permit for the project on February 14, 1974, as well as a permit for its docks and quays. Four days later, however, Pompano Beach revoked the permits due to claimed "administrative oversights," including a dispute over the number of parking spaces required for the project. In June 1974, Yardarm filed suit in Broward Circuit Court against Pompano Beach to force the issuance of its permit.

Two years later, in September 1976, the court ruled that, although Pompano Beach had "the right, and probably the duty," to rescind the permit it had issued on February 14, 1974, Yardarm was "entitled to apply for a new

permit upon the presentation of plans that [were] in compliance with the building and zoning laws that were applicable on February 14, 1974." The court observed that the omissions and errors contained in Yardarm's plans were "such that the Building Official ordinarily would not have refused the permit," absent the "obvious desire by the City to oppose the granting of the building permit to the Plaintiff."

Pompano Beach did not appeal the court's decision, and Yardarm resubmitted its plans in September 1976. However, Pompano Beach again refused to issue a building permit, claiming that Yardarm had still failed to provide sufficient parking to comply with the building code, an issue which had not been directly addressed in the court's earlier order. Accordingly, in February 1977, Yardarm sought supplemental relief from the circuit court to require issuance of its permit. The court found in favor of Yardarm on the question of parking and Yardarm was issued a building permit on March 15, 1977, the day following the court's ruling.

Due to expenses associated with its fight to obtain the permit and rising construction costs, Yardarm claims it was no longer able to finance construction on its own. Nonetheless, Yardarm decided to proceed with preliminary site work on the project while it sought permanent financing. With its permit finally in hand, in April 1977, Yardarm closed and demolished the restaurant and began preliminary site work on the hotel.

After demolishing the restaurant, however, Yardarm realized that its new permit (unlike the earlier permit) did not contain approval for its seawall, dock and quays. With site preparation continuing, in May 1977, Yardarm sought

City approval of its seawalls and docks. Pompano Beach eventually approved the seawall, but refused to issue a dock permit, as did the board of appeals.

In January 1978, now with more than $591,000 invested in the project, Yardarm brought suit against Pompano Beach to require it to issue a permit for construction of the dock. While the lawsuit was pending, Yardarm slowed, and eventually stopped, construction of the hotel, apparently because of estimates that it would cost $500,000 more to build the docks after construction of the hotel. In the meantime, Yardarm unsuccessfully continued to pursue permanent financing for the hotel.

Nearly one year later, in December 1978, following trial, the parties stipulated to an order which permitted Yardarm to build a dock seventy-five feet into Hillsborough Bay. However, following entry of the order, Yardarm did not resume construction of the hotel. It now faced hearings before the Corps of Engineers [the "Corps"] on the question of the issuance of a permit concerning the dock. Although Pompano Beach had been required by the December 1978 order to furnish any written assurances to the Corps, Pompano Beach's city manager not only requested that Yardarm's application for a permit be denied, but requested a public hearing on the issuance of the permit in the event the Corps was undecided on the issue.

The Corps eventually issued the permit, but in July 1979, while the hearings requested by Pompano Beach were still in progress, Pompano Beach determined that Yardarm's building permit had lapsed due to a work suspension in excess of ninety days. In making this determination, Pompano Beach relied on their recently enacted rule that work requirements would not be tolled by

litigation between the parties. Yardarm maintained that the applicable rules were those in place in 1974, when it applied for its permit, which rules preserved the permit where a work stoppage was caused by litigation.

Relying on the 1974 rules, Yardarm went back to court in July 1979, asking for an order requiring Pompano Beach to reissue the building permit. Yardarm apparently lost before the hearing officer, but three months later, in September 1979, the board of appeals (which was chaired by Yardarm's architect) reinstated Yardarm's permit.

Pompano Beach appealed the board's ruling and issued a stop work order until an appeal to the circuit court was decided. Once the circuit court ruled in favor of Yardarm in December 1979, finding that the applicable rules were those in place in 1974, Pompano Beach filed a petition for writ of certiorari to the Fourth District Court of Appeal, and this time Pompano Beach issued a stop work order until the appeal or a subsequent appeal (if one was taken) to the supreme court was decided.

While the appeal was pending, Yardarm unsuccessfully continued to cast about for financing for the project. Construction costs had assertedly risen from $4.3 million in 1974 to more than $14 million in 1980. Nevertheless, Yardarm's advisors recommended the owners purchase a second parcel, west of the property Yardarm already owned, when it became available. They believed it would make the project more attractive to institutional lenders and would enable Yardarm to sign a management contract with a major hotel chain. In order to finance the purchase,

however, Yardarm would have to mortgage the east parcel. Yardarm purchased the west parcel on February 14, 1981.[3]

Five months after Yardarm purchased the west parcel, in July 1981, the Fourth District Court of Appeal ruled on Pompano Beach's petition for writ of certiorari, which was directed solely to Pompano Beach's contention that the board's original order was not supported by substantial competent evidence. The court agreed with Pompano Beach that no true "evidence" had been presented to the board since the parties had relied on the argument of counsel. Nonetheless, the court held that since Pompano Beach had actively participated in the proceedings before the board without objection, it could not "be heard to complain about the meeting's irregularities," and denied the petition.[4]

Approximately two weeks after the Fourth District's ruling on July 16, 1981, Yardarm's building permit for the east parcel was reissued by Pompano Beach. Because of its intervening purchase of the west side property, however, Yardarm had to redraw its plans and attempt to obtain plat approval for a building on the west side. Yardarm continued to pursue financing, this time for the consolidated project.

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[3] Yardarm was actually able to purchase only two of the three parcels which made up the west side. It obtained a long-term lease of the third parcel, and this lease ultimately became a problem in Yardarm's attempts to obtain financing.

[4] *City of Pompano Beach v. Broward County Bd. of Rules and Appeals,* No. 80-145 (Fla. 4th DCA July 1, 1981) (unpublished order).

Recognizing that at this point it had little chance of obtaining permanent financing without a partner to guarantee its loan, Yardarm turned to Ralph Mann and Ron Schroeder of the Glen Ivy Financial Group. Mann and Schroeder agreed, in exchange for a percentage of hotel profits, to let Yardarm use their financial statements in order to obtain financing. Bank of America in San Francisco suggested Ridge Mortgage in New Jersey, a company allegedly having access to union funds. Ridge Mortgage required Yardarm to deposit in excess of $200,000 as an application fee. This turned out to be a scam and Yardarm lost the $200,000 commitment.

Following the problems with Ridge Mortgage, Yardarm continued to submit loan packages; however, because Yardarm had been required to take on a partner, it refused to consider any loan which would not fully compensate it up front for the property and repay its costs – a total of approximately $6,000,000.

Despite its continuing problems, Yardarm received two substantial offers to buy its stock in 1983. On April 28, 1983, Yardarm received an offer of $6 million for Yardarm's stock with an assumption of Yardarm's outstanding $2.2 million mortgage. This offer was withdrawn on May 5th, 1983, when the buyer learned that there was an outstanding option to purchase the property which had been given by Yardarm. Yardarm received an offer from a second purchaser in August 1983, for $8,000,000. Yardarm rejected the offer because it felt it was too low.

While Yardarm allegedly waited for approval of its west side permits, it took out a number of short term loans to fund the minimal construction necessary to prevent its permit on the east side from being revoked for lack of work

and to pay its consultants while it sought approval of the west side. In January 1984, Yardarm took out the last of its loans, a $2.8 million loan with Sunrise Savings and Loan ["Sunrise"], part of which was used to retire Yardarm's prior loans; the remainder was used to fund sufficient construction to keep the east side permit in place.

Yardarm obtained plat approval for the west side in 1982 and site plan approval in 1984, but apparently never submitted an application for a building permit on the west side before Sunrise filed for foreclosure on May 8, 1985. With the property in foreclosure, Yardarm's permit on the east side was again revoked for insufficient work. Yardarm was informed, however, that it could reinstate the permit by refiling plans within 180 days. This deadline set by Pompano Beach would expire October 30, 1985. With the building permits lapsed, Pompano Beach also began to consider repealing the ordinance under which Yardarm had obtained its eighteen story special use exception.

The first reading of the ordinance repealer took place on September 3, 1985, and a second reading was scheduled for October 29th. In the meantime, on October 10, 1985, Yardarm submitted a consolidated plan for construction covering both parcels. Once Yardarm learned, however, that repeal of the special exception ordinance was under consideration and with its permit deadline two days away, Yardarm filed suit to enjoin the Pompano Beach city commission from meeting to repeal the eighteen story ordinance. The trial court granted the injunction on November 20, 1985.

Pompano Beach appealed the entry of the injunction, but gave Yardarm tentative approval for its consolidated plan on February 26, 1986. By this time, however, a final

judgment of foreclosure had already been entered against both properties and a foreclosure sale was set for March 21, 1986. On March 4, 1986, Pompano Beach gave Yardarm site approval for the project and notified it that it had 180 days to obtain a building permit for the consolidated project, but on March 20, 1986, Yardarm filed for protection in bankruptcy court. The bankruptcy stay was later lifted and the property was sold in foreclosure to the FSLIC as receiver for Sunrise. As the lower court observed, the ironic end to this sorry saga was that Pompano Beach then purchased the land from the FSLIC. Yardarm estimates that as of the foreclosure, the land was worth $6.2 million.

In July 1987, the Fourth District Court ruled in favor of Pompano Beach in its appeal from the order enjoining it from repealing the eighteen story ordinance.[5] The issue on appeal was whether Pompano Beach's action in attempting to revoke the ordinance involved a gross abuse of discretion. Yardarm apparently argued that Pompano Beach was estopped from revoking the ordinance as to Yardarm. In holding that Pompano Beach was not estopped, the court found: (1) Pompano Beach's earlier obstructionist tactics would not form the basis for an estoppel since those tactics ceased in 1979 and Yardarm had still failed to make any real progress on the hotel in the intervening years; (2) Pompano Beach's refusal to process the application in 1985 could not form the basis for an estoppel since Pompano Beach was entitled to delay issuance of the permit given that a zoning change was in

[5] *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 509 So.2d 1295 (Fla. 4th DCA 1987).

progress; and (3) Pompano Beach was not equitably estopped from revoking the ordinance (exception) as to Yardarm because there had been no showing that Yardarm had incurred "extensive obligations" or undergone such "a change in position" so as to make the doctrine applicable.

On September 15, 1987, Yardarm filed the instant action against the City of Pompano Beach for inverse condemnation of its property. The complaint alleged that Pompano Beach's extended obstruction of Yardarm's attempts to build its hotel and marina had worked an inverse condemnation of Yardarm's property of both a temporary and a permanent character.[6] Pompano Beach denied any taking had occurred, and asserted a number of affirmative defenses, including res judicata, collateral estoppel, law of the case and the statute of limitations. When Yardarm ultimately identified the precise date of taking as October 30, 1985, the date on which its right to reinstate the building permit on the east side expired, Pompano Beach also asserted the defense of failure to exhaust administrative remedies.

At trial, Yardarm's case was based on evidence that City officials had willfully obstructed construction on the east side from at least 1974 though 1981; that after 1981, the City harassed Yardarm continually; and that Yardarm repeatedly tried to obtain financing for the entire property from 1981 through 1985 but could not do so because of Pompano Beach's earlier activities. Pompano Beach's case

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[6] A second count under 42 U.S.C. § 1983 was disposed of before trial based on Yardarm's failure to exhaust its state remedies prior to filing suit. Yardarm's federal takings claim was dismissed for the same reason.

centered on evidence that its obstructionism had ended, at the latest, in 1981; that Yardarm's inability to obtain financing was due to a number of causes unrelated to Pompano Beach's earlier actions; and that Yardarm had ultimately lost the property because it had mortgaged the east side property to buy the west side. Pompano Beach also presented evidence concerning the offers to buy both properties for $8,000,000 which Yardarm had rejected in 1983.

In its final order, the court found that Pompano Beach had effected a permanent taking of Yardarm's property on October 30, 1985, based on its history of obstructing the issuance of Yardarm's permit. The final judgment expressed the lower court's reasoning:

> As to the taking, Yardarm's cause is pregnant with equity. The only embryo the court can countenance (by the City) was the action taken by Walter Williams, the Chief Building Official; however, the City's obstructionist and illegal acts aborted Williams' professed policy toward Yardarm long ago. The course of action chosen by the City initially and throughout the years that the parties have been engaged in litigation, must be described not only as arbitrary but also must be equated with "unfair dealing." Every citizen (which includes Yardarm) has the right to expect that he will be dealt with fairly by his government. Unfair dealing by a municipality carries with it the attendant responsibility for the adverse effect it knows or should know its deliberate inaction will have upon the parties with whom it is dealing. *See Hollywood Beach Hotel* case.

The first factor to be taken into consideration by the landmark case of *Penn Central Transportation Co.* is the economic impact the governmental action has on the claimant. In this case, Yardarm and its stockholders ultimately filed for bankruptcy primarily because of the City's action. Probably the two most important factors cited in the *Penn Central* case are the "character" of the governmental action and whether the governmental tribunal reasonably concluded that the "health, safety, morals and general welfare" would be promoted prohibited particular uses of land. As to the "character" of the action taken here, it was purely political. The Hillsborough Association, through Fletcher Riley, jumped on the Yardarm issue knowing that the Mayor and the other Commissioners would march to their tune because of the upcoming election. Further, at no time can it be said that the regulatory actions taken by the City promoted safety, morals, health and the general welfare of the City. The only thing promoted by the politicians was the protection of the property owners (Hillsborough Association) from having their view of the ocean and light at the lighthouse obstructed by the construction of the hotel. This distinction is important because City's counsel have relied on the *First English Evangelical Church* case for the proposition that the landowner must prove that he was denied *all* use of his property. In the Court's view *First English Evangelical Church* is distinguishable because the ordinance in that case prevented the construction of buildings in a flood prone area which certainly promoted the general welfare and safety of the community. In this case, it is undeniable that the only circumstance which necessitated the regulatory action was the adverse political climate which wrought

defeat on those commissioners who voted in favor of constructing the hotel.

Similarly, in the *City of Clearwater* case, the court held that the passage of the ordinance for "sanitary," "aesthetic," and "stability" of the neighborhood were not enough for the general welfare of the community. In holding for the property owner, the court went on to state that if the regulatory action had invaded personal or property rights unnecessarily or unreasonably, in violation of the Florida and Federal Constitutions, then it must be equated with arbitrary and capricious action. In our view, the latter principle applies here; therefore, the property owner is not required to prove denial of *all* use of its property.

To add emphasis to the proposition that it is implicit that the regulatory action be taken for a valid public purpose, just the reverse was true in this case. In fact, two of the City officials, Kleingartner and Riley clearly usurped their authority as they committed illegal acts; the City Manager got involved when it was not his duty to do so; the Mayor was concerned about getting reelected as were the other commissioners. Finally, under no circumstances can it be said that the public's health, safety and welfare were promoted by protecting the homeowners' view of the ocean and the light from the lighthouse.

While it is not necessary to prove denial of *all* use (for the reasons stated), Yardarm in fact was denied all use of its property. Time and time again civil actions had to be brought; they were always appealed by the City. In the court's estimation these appeals were both dilatory and frivolous. They fostered nothing but to frustrate Yardarm's purpose. Illegal acts of certain City

> officials caused a lawful permit to be revoked which led to a series of events which ultimately led to the loss of Yardarm's property. In this hostile atmosphere, even if Yardarm had wanted to use the property for another purpose, the City would not have allowed it.
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> Counsel for the City have cited the case of *McNulty v. Town of Indiatlantic,* 727 F.Supp. 604 [(Fla.1989)] in support of their position that the property owner was not denied all use of his property. As in the *First English* case, a *valid* ordinance was in place for the protection of sand dunes. For this reason, *McNulty* can be distinguished from the facts of this case.

We[7] begin by stating the obvious – that the final judgment of a "permanent taking" based on obstructionist tactics of Pompano Beach is unorthodox for many reasons. First, Yardarm did not own the real property that it claimed the City had "taken;" it had been lost to Yardarm's lender through foreclosure. More important, it involves a claim that Pompano Beach's improper abuse of its permitting power to prevent Yardarm from building an eighteen story hotel was a "taking." Finally, Yardarm's claim depends on the notion that the City did not "take" Yardarm's property until the landowner "gave up" trying to put an eighteen story hotel on it.

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[7] After oral argument, the entire Fourth District Court of Appeal recused itself and a panel of the Fifth District Court of Appeal was assigned by the Chief Justice to sit as the Fourth District court to decide the case. Because of the lapse of time and the pace of developments in this area of the law, the new panel allowed rebriefing and held a second oral argument.

The threshold question presented is whether Yardarm's claim can support a judgment for inverse condemnation. We hold that it cannot. Inverse condemnation is a cause of action in favor of a property owner against an agency having the power of eminent domain to recover the value of property that has been *de facto* taken, by the agency, even though no formal exercise of the power of eminent domain has been attempted. *City of Jacksonville v. Schumann,* 167 So.2d 95 (Fla. 1st DCA 1964), *cert. denied,* 172 So.2d 597 (Fla.1965). A "taking" in Florida requires the deprivation of substantially all use of the property alleged to have been taken. *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.,* 640 So.2d 54 (Fla.1994); *Askew v. Gables-By-The-Sea, Inc.,* 333 So.2d 56, 61 (Fla. 1st DCA 1976), *cert. denied,* 345 So.2d 420 (Fla.1977).

This is not a typical case where a public body's land use regulation has gone "too far,"[8] depriving an owner of substantially all use of his land. The lower court incorrectly ruled that a judgment for inverse condemnation could be had, even in the absence of a deprivation of substantially all use of Yardarm's property, if Pompano Beach's interference with Yardarm's plan for development were an invalid exercise of its police power. This was an understandable error given that "takings" law is one of the most confused areas in American jurisprudence. Confusion on this issue may have arisen, in part, from the notion that a valid exercise of the police power regulating the use of property can give rise to no remedy unless the

[8] *Pennsylvania Coal v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

landowner suffers a deprivation of substantially all use of his land. Somehow, the converse of that proposition found its way into the analysis – if not the holdings – of several appellate decisions. Confusion surely has also resulted from language used loosely in the cases.[9] Recent decisions make clear, however, that the *sine qua non* for inverse condemnation is a "taking" – whether a valid exercise of police power or not, whether temporary or permanent.

In Florida, any uncertainty on this point was dispelled by the supreme court in *Tampa-Hillsborough County Expressway Authority,* 640 So.2d at 57. In that case, a land use regulation previously had been struck down by the high court as an invalid exercise of the police power. Based on that ruling, the landowner brought an inverse condemnation action. The court held that the owner was required to prove a "taking" in order to maintain a claim for inverse condemnation, even though the regulation had been struck down as an improper exercise of the police power. Here, the lower court determined that the City's actions were "illegal," "arbitrary and capricious," "not taken to promote the public's health, safety or welfare," "frivolous," "dilatory" and a "usurpation of authority." Although speaking in terms of a "taking," the fact findings of the lower court are a classic expression of a denial of due process. *Corn v.*

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[9] *Compare Agins v. City of Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), with the case it relies upon, *Nectow v. City of Cambridge,* 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928), which involved an *injunction* against the improper exercise of the police power. *See also Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 123, 98 S.Ct. 2646, 2658, 57 L.Ed.2d 631 (1978); *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834 n. 3, 107 S.Ct. 3141, 3147 n. 3, 97 L.Ed.2d 677 (1987).

*City of Lauderdale Lakes,* 997 F.2d 1369, 1374 (11th Cir.1993), *cert. denied,* 511 U.S. 1018, 114 S.Ct. 1400, 128 L.Ed.2d 73 (1994). The lower court correctly perceived that the law provides a remedy for such conduct but, unless there is a deprivation of substantially all economic, beneficial or productive use of the property, inverse condemnation is not the remedy. If an *invalid* exercise of police power causes damage not amounting to a "taking," the claim is for a violation of substantive due process and the remedy is monetary damages. *See e.g., Eide v. Sarasota County,* 908 F.2d 716, 720-722 (11th Cir.1990), *cert. denied,* 498 U.S. 1120, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991). *See also Tampa-Hillsborough County v. A.G.W.S.,* 608 So.2d 52, 57 (Fla. 2d DCA 1992) (Altenbernd, J., dissenting).

An example of the correct legal analysis applicable to this kind of case can be found in *Bello v. Walker,* 840 F.2d 1124 (3d Cir.), *cert. denied,* 488 U.S. 868, 109 S.Ct. 176, 102 L.Ed.2d 145 (1988). The plaintiff was the developer of a multi-phase housing project. It had submitted a site plan for five phases, obtained building permits for phase one and completed construction. When subsequent application was made for phase five of the project, however, the building permit was denied on the ground that the developer had failed to plan the build-out of the phases in numerical order. Evidence suggested that the town council had made the decision to deny the permit because some of the members wanted to discourage multi-unit housing and because two members of the council had personal animosity toward one of the developer's employees, who was their political rival. Eventually, the developer obtained a court order requiring the issuance of the permit.

The developer also filed suit against the City and the individual council members, asserting deprivation of due process and equal protection, pursuant to 42 U.S.C. § 1983, violation of federal antitrust laws and inverse condemnation. Summary judgment was entered in favor of all defendants on all claims and the developer appealed. The Third Circuit Court of Appeals ruled that the claim for violation of substantive due process, alleging governmental action that was arbitrary, irrational, and tainted by improper motive, including partisan, political or personal reasons unrelated to the merits of the application for the permits, would support a claim under 42 U.S.C. § 1983. *Id.* at 1128-29. *See also Brady v. Town of Colchester,* 863 F.2d 205, 215-16 (2d Cir.1988).

In contrast, the Third Circuit upheld the summary judgment in favor of the defendants on the "taking" claim, noting that the plaintiffs could not make out a claim that their property had been "taken" without just compensation because they had merely been denied a particular building permit. Because they retained the right to put their land to multiple alternative uses, the municipality's actions could not have been said to have denied them all use of their property. *Id.* at 1131.

Although the lower court in this case principally ruled that Yardarm need not prove a denial of all use of its land because Pompano Beach's actions were improper, the court also attempted to fit within the "takings" cases by finding that "[i]n this hostile atmosphere, even if Yardarm had wanted to use the property for another purpose, Pompano Beach would not have allowed it." This finding is simply not supported by any evidence in the record. While Yardarm's evidence may have demonstrated Pompano Beach's determined opposition to Yardarm's construction of an

eighteen story hotel, there is no evidence of obstruction of any other use. Yardarm was in fact using the property for an alternative use – the restaurant – through April of 1977. There was always the ability to build a ten story building. In addition, Yardarm was in possession of a valid permit to build an eighteen story hotel on the east side from July 1981 until March 1985. No permit for the west side was ever applied for.

As alluded to in *Bello, supra,* in cases involving permit denials, it is usually difficult for a claimant to establish a "taking." A sister court in Oregon recently explained:

> [W]ith rare exceptions, no particular denial of an application for a use can demonstrate the loss of all economic use. That is so for two reasons. First, the fact that one use is impermissible under the regulations does not necessarily mean that other economically productive uses are also precluded; and second, until alternative uses are applied for or alternative means of obtaining permission for the first use are attempted, there can be no conclusive authoritative determination of what is legally permissible by the regulations.

*Nelson v. City of Lake Oswego,* 126 Or.App. 416, 869 P.2d 350 (1994). *See also Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 136-137, 98 S.Ct. 2646, 2665-2666, 57 L.Ed.2d 631 (1978).

Total takings based on the denial of a permit are appropriate where the evidence shows that a city intends to deny *all* permits for development as an indirect method of dedicating property to a public purpose. *See, e.g., Vatalaro v. Department of Envtl. Regulation,* 601 So.2d 1223 (Fla. 5th DCA) (holding permit denial was taking requiring compensation where language used in denying permit

made it clear that only use for ecologically sensitive land was to look at it), *review denied,* 613 So.2d 3 (Fla.1992).[10] A "taking" may also be found where a landowner is denied a permit for the only feasible use of the land, thereby effectively denying him or her the "economically viable" use of the land. *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985) (recognizing principle); *Resolution Trust Corp. v. Town of Highland Beach,* 18 F.3d 1536, 1549 (11th Cir.1994) (property was "completely unusable" after lapse of PUD zoning). *See also Alexander v. Town of Jupiter,* 640 So.2d 79 (Fla. 4th DCA 1994) (landowner denied permit to clear land to remove trees that would permit survey.)

Even if the earlier denials of building or dock permits by Pompano Beach could have constituted a "taking" of Yardarm's property, all requested permits had been issued by 1981. The trial court made no findings concerning any further obstruction by the City. Rather, the court focused on Yardarm's inability to obtain financing after 1981 due to the City's "hostility" to the project. The inability to obtain financing may be caused by a "taking" or may be some evidence of a "taking," but it is not a taking. *See*

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[10] *Accord Kraft v. Malone,* 313 N.W.2d 758 (N.D.1981) (by denying building permit in city, city had effectively taken property for public park and drainage ditch); *City of Austin v. Teague,* 570 S.W.2d 389 (Tex.1978) (finding taking where city denied permit specifically to preserve area as scenic easement for benefit of public and to prevent development of any kind). *See also Karatinos v. Town of Juno Beach,* 621 So.2d 469 (Fla. 4th DCA 1993) (finding that city was not cause of taking where city engineer testified that state would never have permitted construction of any building on property), *review denied,* 634 So.2d 625 (Fla.), *and cert. denied,* 511 U.S. 1127, 114 S.Ct. 2133, 128 L.Ed.2d 864 (1994).

*Southpark Square, Ltd. v. City of Jackson,* 565 F.2d 338, 343 (5th Cir.1977), *cert. denied,* 436 U.S. 946, 98 S.Ct. 2849, 56 L.Ed.2d 787 (1978). In *Southpark,* the court considered the "novel" question of "whether a city's denial of a building permit, ultimately resulting in the owner's loss of his property for inability to obtain financing, is a compensable taking." *Id.* at 342. The court rejected the claim, reasoning:

> A city would be unduly hamstrung if its permit decision subjected it to potential liability on the basis of financial arrangements independently made by property owners affected by those decisions.

*Id.* at 343. As explained above, if Yardarm was placed in financial difficulty as a result of the City's prior unlawful acts, it had to pursue a damage remedy; its land had not, however, been taken by Pompano Beach.

Finally, Yardarm's alleged inability to obtain financing is not the type of negative economic impact compensable as a taking. *See Highland Beach,* 18 F.3d at 1536. For the period after 1981, Yardarm is not only unable to show that it was denied any particular use of its property, but it is unable to establish a negative economic impact on land value resulting from Pompano Beach's actions. The Federal Circuit Court of Appeals has recently held that the issue of negative economic impact requires consideration of the relationship of the owner's basis or investment and is measured by the change, if any, in the fair market value before and after the "taking." *See Florida Rock Indus., Inc. v. United States,* 18 F.3d 1560 (Fed.Cir.1994). Yardarm itself estimated that the value of its property rose from $5 million in 1981 to $6.2 million in 1985, and it rejected an

offer for the property of $8 million in 1983 because it thought the offer was too low.

Also relevant to our conclusion that there was no "taking" in this case, as a matter of law, is the date this "taking" was found by the lower court to occur: the date of expiration of the City's 180 day deadline within which to reapply for a permit after the east parcel permit had lapsed for lack of work. This date is not tied to any particular act on the part of Pompano Beach; rather, it appears to represent the date Yardarm decided to (or had to) "give up." Yardarm contends that, under Florida law, the date of a "taking" is the date a landowner quits struggling against the condemning authority's confiscatory regulation. This argument, however, is merely a misapplication of the ripeness doctrine. Ripeness and persistence are not the same thing. Ripeness is required in regulatory taking cases because a court is unable to determine whether a regulation "goes too far" for purposes of a regulatory "taking" analysis until it has been determined exactly how far the regulation has gone. Ripeness does not require Yardarm to engage in years of litigation with the City. Once Yardarm had made a definite and meaningful effort to obtain City approval for its eighteen story hotel and Pompano Beach had evinced an intention not to give it, Yardarm's claim was ripe.[11] If its property were effectively

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[11] *See generally* Note, *Finality Ripeness in Federal Land Use Cases from Hamilton Bank to Lucas*, 9 J. of Land Use & Environmental Law 101, 115-27 (Fall 1993). Yardarm itself has argued that by June 1974 it had become "obvious" that Pompano Beach had "no intention to reissue the permit to build the hotel. . . ."

"taken," Yardarm was not obliged to keep suing to invalidate the City's decision, although it was privileged to do so. If, while in force, the City's invalid actions caused a "taking," damages were available for the "temporary taking." *Lucas*. Here, by 1981, the permit refusal had ended and the permit was in hand.

The probable reason for the court's selection of the date of "taking" was Pompano Beach's statute of limitations defense. In rejecting this defense, the lower court relied on *Askew*.[12] On appeal, Pompano Beach again contends that, even if there were a permanent total "taking" in this case, this action is barred by the statute of limitations. In making this argument, Pompano Beach asserts that the applicable statute of limitations is the four year statute pertaining to either "[a]n action founded on a statutory liability," 95.11(3)(f), Fla.Stat. (1985), or the four year statute applicable to "[a]ny action not specifically provided for in these statutes." § 95.11(3)(p), Fla.Stat. (1985). Pointing out that Yardarm's permit for the east side was reinstated on July 16, 1981, and that the permit remained in effect until May 1, 1985, when it was revoked by operation of law, Pompano Beach maintains that there clearly was no "taking" in the four year period preceding Yardarm's commencement of the action and that, consequently, the action is barred.

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[12] *Askew* is inapposite to the facts of this case, however. Although the pattern of conduct may have been similarly lengthy on the part of the state, the triggering event, which was opposition to the Corps of Engineers' extension of the landowner's dredge permit, occurred within the statute of limitations. The statute of limitations was not an issue in that case.

Yardarm agrees that the appropriate statute of limitations, if any,[13] is four years, but it contends that Pompano Beach's limitations defense is "nonsensical" in that "Yardarm could not bring a taking case against Pompano Beach because it kept winning." Relying on *Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Improvement Trust Fund,* 427 So.2d 153 (Fla.1982) and *Albrecht v. State,* 444 So.2d 8 (Fla.1984), Yardarm contends that a cause of action for inverse condemnation does not accrue until a property owner stops challenging the action taken by the government in opposition to development. *Albrecht* and *Key Haven,* however, really have no application to this issue and do not support Yardarm's theory. *Albrecht* simply stands for the proposition that, assuming a deprivation of all use of the land has already taken place, the landowner has two choices: to try to undo the taking or to seek compensation. This remains true, if incomplete, in light of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). Now it is clear that the landowner may seek compensation for the

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[13] *See generally* Charles C. Marvel, *State Statute of Limitations Applicable to Inverse Condemnation or Similar Proceedings by Landowner to Obtain Compensation for Direct Appropriate of Land Without the Institution or Conclusion of Formal Proceedings Against Specific Owner,* 26 A.L.R.4th 68 § 2 (1983). The argument that the statute of limitations is inapplicable to actions for inverse condemnation has previously been rejected by the Florida Supreme Court. *See, e.g., Hillsborough County v. Kensett,* 107 Fla. 237, 144 So. 393 (Fla.1932) (actions for inverse condemnation are subject to both the statute of limitations and the doctrine of laches). This case is a good illustration of why a statute of limitations is appropriate in these types of cases; here, several of the key witnesses had died or become unavailable years before this action was brought.

period while there was a deprivation of use before the taking was undone. It does not mean, however, that the statute of limitations for a "taking" does not begin to run so long as the landowner opposes the agency action that has worked a "taking."

The statute of limitations issue in this case first requires consideration of when the City took any action that deprived Yardarm of substantially all use of its land. Assuming arguendo that the answer is something other than "never," it is at least clear that, on the date suit was filed, September 15, 1987, the statute of limitations had run as to any "taking" that occurred earlier than September 15, 1983. Any "taking" occurred when the permit was denied and Yardarm lost its right to develop, *Vatalaro,* 601 So.2d at 1229, and ended in 1981 when the permit was reissued.

The final question is whether the City took any separate action that rose to the level of a "taking" after September 15, 1983. We can find nothing in the record that would support a finding that there was a "taking" by the City after that date. Contrary to the view taken by the lower court, in this type of case, there can be no "domino effect" or "piggybacking" of all the offenses of prior years so that previous, time-barred "temporary takings" turn into a permanent taking whenever the regulatory authority takes any new action adverse to the developer and the developer decides he has had enough. If Yardarm had a "taking" claim for what happened up to July 16, 1981, it had until July 16, 1985 to bring it.

Because this case is before us on an appeal from a non-final order and because we reverse that order, the case is remanded to the lower court for further proceedings. We

note that the lower court previously had entered an order granting partial summary judgment on Yardarm's due process claim brought under 42 U.S.C. § 1983 based on the City's contention that such a claim would be "premature" until the "taking" claim was disposed of. Although we express no opinion about the merits of a due process claim on this factual record, in light of our opinion, Yardarm is entitled to reconsideration of the summary disposition of this cause of action.[14]

REVERSED and REMANDED.

COBB, W., and PETERSON, E., Associate Judges, concur.

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[14] We find no merit in the issue on appeal pertaining to the improper use of deposition testimony. We do not reach the *res judicata*/collateral estoppel/law of the case issue because our decision makes it unnecessary.

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| YARDARM RESTAURANT, INC.,<br>Plaintiff,<br>vs.<br>CITY OF POMPANO BEACH,<br>Defendant.<br>_____ / | IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY FLORIDA<br>CASE NO: 87-19652(18) |

**JUDGMENT DETERMINING LIABILITY**

THIS CAUSE came to be heard on the liability trial of this matter. The court bifurcated the damage trial for a later date. The Plaintiff is Yardarm Restaurant, Inc., hereinafter called "Yardarm". Defendant is the City of Pompano Beach, hereinafter called "the City". Both parties were present, represented by counsel, and participated fully in the proceedings.

**BACKGROUND**

In the beginning in the year 1972 there was a successful restaurant known as the Yardarm owned by the Plaintiff and located on a valuable piece of property with a view of the Hillsboro Inlet, the Lighthouse, and the Atlantic Ocean in Pompano Beach, Florida.

At that time and place the owners of the Plaintiff, the brothers, Jim and Tom Stephanis, had a dream to build a five star hotel on the property. The hotel if constructed would block the view of some of its neighbors in the Hillsboro Shores section of Pompano of the Lighthouse and Ocean. This case involves a claim for damages arising out of the City's efforts to thwart construction of the hotel on Plaintiff's property.

As a result of the urging of the neighbors of the Plaintiff, litigation began in 1973. In 1986, after approximately twelve years of litigation and administrative procedures involving Yardarm's attempts to obtain its approvals and permits, Yardarm finally lost its property through foreclosure proceedings and the City of Pompano subsequently bought said property as a result of the foreclosure.

In 1972 when Yardarm started the process the property was zoned for the highest business use allowed even after reducing height limitations. In 1973 the City approved an eighteen story "Special Exception Use" for the Yardarm. Building permits were validly issued and with reliance thereon, and after substantial litigation, the Yardarm subsequently tore down the successful restaurant on the property and invested substantial money. Under these circumstances, the City was no longer free to retract approvals, and its conduct to obstruct development was arbitrary and capricious.

The chronology of the litigation is attached hereto as Appendix A. The cast of characters in this saga is contained in Judge C. Lavon Ward's Final Judgment of June 5, 1991 and need not be reiterated here, and is attached hereto as Appendix B.

## PROCEDURAL HISTORY

After foreclosure of its property, Yardarm sued the City on September 15, 1987 for damages claiming just compensation for an unlawful taking in Count I and for damages for deprivation of civil rights under 42 U.S.C. §1983 in Count II.

The Court preliminarily granted partial summary judgment in the City's favor as to §1983 on ripeness grounds, without prejudice to refile later. See Order on Motion for Summary Judgment dated 1/31/90. Thereafter, the case proceeded to non-jury trial on the takings claim before Judge Lavon Ward. Judge Ward made extensive findings of fact in a 21 page opinion, concluding that there had been a taking of the Plaintiff's property and ordering a jury trial on damages. See Final Judgment dated 6/5/91.

On appeal the Fourth District did not disturb the findings of fact, but disagreed with Judge Ward's conclusion that the facts supported a taking because only the one particular hotel use, not all use, had been denied.[1] The District Court reversed but stated that Yardarm was entitled to reconsideration of the summary disposition of its due process claims.

After remand, Judge Ward suffered a serious stroke, which unfortunately led to his untimely retirement. At that point, the case was reassigned to the undersigned for trial. At trial, most of the evidence previously presented to Judge Ward was again presented. However, Yardarm's attorney had discovered additional facts, including some rather remarkable admissions of one City Commissioner as to the unofficial "policy" of the Commission and the testimony of the neighbors of another Commissioner as to

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[1] The case was orally argued before one panel of the Fourth District. Thereafter, by order of Justice Barkett of the Florida Supreme Court, sua sponte, the entire Fourth District Court was recused and a panel from the Fifth District was appointed. The case was rebriefed and argued again, with a special panel sitting in place of the Fourth District.

secret meetings concerning Yardarm. Further, many 1985 interoffice memos between City Officials were introduced into evidence. These dealt with high officials planning the repeal of the Special Exception and directing the activities of the Building Official. These additional facts are discussed further in the Findings of Fact.

## FINDINGS OF FACT

### A. The Special Exception, The Building Permit, and Early Litigation – 1972-1981.

The Yardarm built and ran a very successful restaurant on the east parcel of the subject property since 1959.[2] In 1972, Yardarm decided to build an 18 story hotel on the east parcel. When inquiry was made, the City Building Official advised that there were no height or density restrictions or other legal impediments in the City's Ordinances which stood in the way of building the hotel, and there were no plans in progress to change the Ordinances. The property was zoned B-3 (highest and full business use) and B-5 (boat docks and marina). Accordingly, Yardarm submitted its site plan application in January, 1973.

*1. **Early Political Opposition.*** Yardarm's plans became well known and were highly publicized in the news media. Almost immediately, political opposition to the hotel began to mount. The Hillsboro Shores Improvement Association was a homeowners group located on the south side of the inlet. The Association's main objection to

[2] The east marina parcel (lot 33) was added in 1969 and the west parcel was purchased in 1981.

the construction of the hotel was that it would block their view of the ocean and also block their view of the lighthouse at the inlet.

The local Pompano Beach Republican Club was also a powerful political body. It became involved as an active opponent to the project. Ultimately, it threatened censorship of the Commissioners who supported Yardarm. It tried to intimidate the one Democratic Commissioner for his support of the Yardarm project. It also supported those who opposed Yardarm.

***2. The Special Exception.*** Initially, the City delayed the site plan application while it first passed an ordinance reducing density on April 3, 1973 (Ord. 73-33), and then the height limitation from 18 to 10 stories on May 1, 1973 (Ord. 73-40), and then a moratorium on construction on the beach on May 29, 1973 (Ord. 73-44) and an extension of the moratorium on September 25, 1973 (Ord. 73-89).

In response, Yardarm applied for a Special Exception to construct an 18 story hotel. On October 2, 1973 the Special Exception was approved by a 3 to 2 vote. (Ord. 73-96)

***3. Political Power Shift.*** During the February 1974 election, the Yardarm project was a hot campaign issue. One winner was newly elected Mayor Ken Williams, who had been president of the Hillsboro Shores Improvement Association. The City passed another series of ordinances in late 1973 and 1974 as follows:

| | | |
|---|---|---|
| 11/27/73 | Ord. 74-12 | Sleeping room density reduced |
| 7/2/74 | Ord. 74-66 | Parking space requirements increased |
| 8/13/74 | Ord. 74-56 | Rezoning to B-2 low impact residential business |

***4. 1973 – The First Lawsuit Over the Special Exception.*** The Special Exception was vigorously opposed by the members of the Hillsboro Shores Improvement Association, as well as the Pompano Beach Republican Club. The Association filed suit to set aside the Special Exception. *Hillsboro Shores Improvement Association vs. City of Pompano*, Case No: 73-14220. This was assigned to Judge Jose Gonzalez before his appointment to the federal bench. Yardarm intervened in this lawsuit, as it was pending while the political climate had changed and the new regulations were being implemented. Ultimately on December 15, 1975, Judge Gonzalez ruled in favor of Yardarm, thereby sustaining the Ordinance which created the Special Exception Use, finding that the Hillsboro Shores residents had no legal right to unobstructed views of the Hillsboro Lighthouse and Hillsboro Inlet.

***5. 1974 – Issuance and Revocation of Building Permit.*** On February 8, 1974 Yardarm applied for a building permit. By this time, the project was publicly opposed by the Mayor, the City Manager, the Chairman of the Planning Board (Fletcher Riley), and the Community Development Director (Fred Kleingartner). The Planning Board was an ex-officio citizen's advisory board appointed by the Commission, which had no authority to give directions to the Building Official. Mr. Riley was also an active member in the Hillsboro Shores Improvement Association,

living in the adjoining neighborhood. At the time, the Community Development Director had no official authority either, although the City later appointed Mr. Kleingartner to Director of Planning in December, 1974.

The City officials, including Mr. Kleingartner, met with the Yardarm principals to discuss the permits on February 14, 1974. Despite objections, the Building Official (then Walter C. Williams) approved the permit on that day because the project met applicable criteria. This was appropriate, as the Building Official has jurisdiction over the issuance of permits.

Four days later, on February 18, 1974 the Building Official revoked the permit upon orders given to him by the City Manager. The revocation came as the result of a meeting that morning between the City Manager and the Mayor with Mr. Riley and Mr. Kleingartner. Over the years, the Building Official (then Walter C. Williams) was twice suspended for his refusal to obey directives concerning Yardarm, which suspensions were overturned by the Broward County Board of Rules and Appeals.

Thereafter, the City began to cite technical deficiencies in the plans. The biggest issue, however, was whether the new or old regulations would apply. The City insisted that the building ordinances and rezoning passed after the Special Exception and permit application be applied. The City even authored letters to Yardarm citing deficiencies which Walter C. Williams refused to sign as, in his opinions, the permit should have been issued.

***6. 1974 Through 1981 – Multiple Lawsuits to Reinstate the Building Permit.*** Yardarm filed its first suit on October 28, 1974, *Yardarm vs. City of Pompano*, Case No: 74-7246, seeking to have the permit reissued. For

federal due process requirements, the procedural remedies of the state judicial system are theoretically important protections against potential governmental abuse. Indeed, certiorari remedies are often part of the land use regulatory process prescribed in the zoning ordinances themselves.

Altogether, there were four more lawsuits, a proceeding with the Corps of Engineers, an administrative appeal to the Broward County Board of Appeals, and two appeals to the Fourth District Court. In the first of these cases, Judge Wehle clearly ruled that the February 14, 1974 building regulations applied to this project and Yardarm had a right to its building permit:

> "The real property . . . was zoned business property designed B-3 and B-5 at the time of the application for permit. The Court finds that the hotel is a business property and not a residence property. *Therefore, the Building Code and Zoning Code applicable to business property on February 14, 1974 were applicable to the construction of the hotel.*
>
> *Plaintiff is entitled to . . . a new permit . . . in compliance with building and zoning laws that were applicable on February 14, 1974 . . .* " (emphasis supplied)

The details of the other lawsuits are set forth in Appendix A. Suffice it to say that from 1974 through 1981, the City was overly litigious, engaged in stonewalling tactics, and ignored the clear directives given by Judge Wehle. Perhaps the most egregious act during this period was when, after stipulating to Judge Franza's order allowing the dock permits and directing the City to give the Corps of Engineers required assurances, the City instead wrote the

Corps requesting that permits be denied and demanding a public hearing further delaying the construction. See Appendix A. From 1974 through 1981, Yardarm's position was upheld on numerous occasions by Judges Franza, Wehle, Moriarty and Lee.

*7. Yardarm Tears Down the Restaurant in 1977.* After having prevailed in the third lawsuit over parking issues, Yardarm thought that the struggle was over. It obtained a demolition permit, tore down the restaurant on April 1, 1977 and began construction, not suspecting that the City would continue its campaign of obstruction. At the time, the restaurant was a highly rated financially successful enterprise.

**B. The Recovery Period – 1981 Through 1983**

Yardarm finally got its permit back in July, 1981. Over an eight year period, Yardarm was forced to fight for its permit and special exception use in five lawsuits, several administrative procedures, and two appeals. During this period, Yardarm was only able to actively pursue its development for a little over five months. For years, the City had accomplished in a de facto fashion what it was legally prohibited from doing – killing the Yardarm project.

While all this litigation was pending, construction costs increased dramatically from $5 million to over $9 million. Yardarm no longer had the cash flow from the restaurant operation. Ironically, nine years earlier Yardarm's owners owned the land free and clear and had the financial means to proceed with the hotel. Now, Yardarm needed to involve others in the project.

With permit finally in hand in July, 1981, Yardarm regrouped. Plans had to be upgraded to accommodate for the passage of time and to meet criteria of a national hotel chain. Yardarm put together a well-recognized, competent development team and involved Hilton Hotels as a potential managing entity. Consultants were retained to conduct hotel feasibility studies.

Site plans were revised and submitted, but initial attempts for construction and permanent financing failed. Admittedly, there were some business concerns on the part of the lenders. However, the biggest and overriding reason for this difficulty was the City's hostility toward the project. Early on no lending institution wanted to get involved in a community where there had been so much bitter, political opposition to the project. Because of this acrimonious atmosphere and the adverse publicity, Yardarm's credibility in the financial community was nil." This finding was further confirmed by the testimony of project manager Stanley Graves and mortgage broker Joseph Salamone.

### C. 1983 and 1984 – The Hollohazy Joint Venture, the Clarion Joint Venture and the City's Administrative Impediments

Notwithstanding, Yardarm later attracted a well respected developer – Atilla Hollohazy – who proposed a joint venture with himself and the Canadian Pacific Hotel group. Mr. Hollohazy proposed putting the hotel on the east side and the parking garage on the west. The City reviewed the site plans. According to Mr. Hollohazy, there

were unusual administration delays during this process. Ultimately, the City imposed a variety of roadblocks and unreasonable conditions[3] – one of which was a water pressure issue. The City now contended that Yardarm was required to increase the water pressure for the City's water supply to the property – notwithstanding that Yardarm had an active Building Permit issued for the east side.

Finally, Mr. Hollohazy inquired as to why he could not get his proposal approved. He was told to see Fletcher Riley – the same person who was instrumental in delaying the project back in 1974. Mr. Riley advised Mr. Hollohazy that he would not support hotel development at any height. After a year's effort, Mr. Hollohazy gave up and suggested to Yardarm that they just sell the property – a possibility which was explored and rejected by Yardarm.

In 1984 Yardarm attracted another joint venture partner – AIRCOA and Clarion Hotels – and a firm joint venture agreement was reached. Again, the hotel project design changes were made to met Clarion's specifications.

### D. 1985 – The City's Third Revocation of the Permit and Secret Plans to Repeal Special Exception

On May 8, 1985, Sunrise Savings and Loan Association sued the Yardarm to foreclose its mortgage. This

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[3] Other impediments included extremely restrictive positions taken as to transfer of room densities from the west to the east side, a unity of title as to a portion of the property not platted, and that title to one lot was by a 99 year lease versus fee simple.

highly publicized event did two things. First, it prompted Yardarm to speed up its efforts with the AIRCOA/Clarion venture. Second, it also prompted the City to renew its efforts to stop the Yardarm project, particularly relating to the building permit. The City's efforts were on two fronts – one of which it revealed to Yardarm (Permit Nullification) and the second of which the City concealed (Special Exception Repeal), working on behind the scenes, unbeknownst to Yardarm.

*1. **The City's Public Front – Nullification of Permit; 180 Days to Revise and Re-Submit <u>and</u> Current Regulations.*** On the public front on May 16, 1985 the City declared the building permit null and void, again citing lack of work, but this time giving Yardarm 180 days to revive the permit. Ordinarily, the Building Department gives a builder some notice and an opportunity to recommence construction before a permit is revoked. In this case, however, when the Building Official suddenly and without warning declared the Yardarm permit null and void, he did so *retroactively* back to May 1, 1985. This cut two precious weeks off the Yardarm clock.

In the City's letter nullifying the permit, the City also advised that the Code required that a new permit could only be issued in accordance with current regulations – which had greater setbacks and lower densities. This had the effect of destroying Yardarm's prior plans and reducing the number of hotel rooms, undercutting the feasibility of the project and chances of financing. At this point, the only thing Yardarm had left was its 18 story Special Exception.

The project architect Richard Reilly testified that the Building Official told him that he was "forced to do it".

Then Building Official Guydosik had been the Assistant Building Official when former Building Official Williams had been suspended twice for failing to obey similar instructions.

Yardarm disagreed that its work had completely stopped so as to lose its permit, although admittedly the work had been slow and sporadic. Also, Yardarm felt the City had no right to require the Yardarm to comply with 1985 building regulations. In 1976, Judge Wehle clearly stated that the February 14, 1974 Ordinances applied to this project, which had been reaffirmed by a variety of other judges. If the City felt that there was a change of circumstance due to passage of time, the City should have applied to the Court for relief from the earlier orders, but it was not free to simply unilaterally ignore them, without giving Yardarm an opportunity to be heard. This Court agrees with Yardarm.

However, Yardarm's position had become extremely precarious. Yardarm felt it was futile to sue again or appeal administratively, especially with the foreclosure suit pending.

It was clearly impossible to obtain financing without a building permit. By May 1, 1985, Yardarm had already invested over $2 million in the project. Its property had an estimated value of at least $6 million. Yardarm chose to redraw the building and site plans to comply with the 1985 building regulations, as the building footprint now needed to be revised to meet current setbacks. The plans had to be redone architecturally and then reviewed by mechanical, structural and air conditioning engineers. After working furiously on the plans at a significant cost to Yardarm, on October 10, 1985, the project architect

re-submitted the revised plans for site plan approval – well within the 180 day time limit.

***2. The City's Non-Public Front – Repeal of the 18 Story Special Exception.*** The evidence presented in this case suggests that the City of Pompano Beach had no intention of ever reissuing the Yardarm its building permit, no matter what Yardarm presented and no matter that its 180 day time limit was met.

Notwithstanding that the City told Yardarm that its permits could be re-issued, on the non-public front and behind the scenes, there was a flurry of activity going on concerning the 18 story Special Exception. This involved secret meetings between Commissioners at their homes and by telephone in violation of the Sunshine Law and a variety of interoffice communications between the highest City Officials, including the City Attorney and the City Manager.

***Emma Lou Olsen:*** At the 1998 trial, former Commissioner Emma Lou Olsen admitted that the four other Commissioners "had a policy of stopping anything that Yardarm was doing". Commissioner Olsen sat on the Commission from 1976 to 1986 and then again from 1990 to 1998, She also served as Mayor for a few years. She testified that the other 1985 City Commissioners (Gornes, Flynn, Skolnick and Larkins) – each of whom later voted to repeal the Yardarm 18 story Special Exception – had all made derogatory remarks about the Yardarm outside the Commission meetings. She testified that former Commissioners also opposed the Yardarm project in a similar fashion during the 1970's. She admitted that although the permitting process regarding the Yardarm was handled by administration officials such as the Building Official, the

City Manager and other department heads, their actions required approvals by the City Commission.

***Secret Interoffice Memos:*** The next area of evidence involved the memos issued by the non-elected officials – the City Attorney, City Manager and the Building Official – which evidence a clear intent to quickly repeal Yardarm's Special Exception before the building permit was reissued. In light of the impending foreclosure, this would eliminate any chance of Yardarm obtaining financing and kill the Yardarm project forever. This is detailed as follows.

On June 5, 1985, the City Attorney wrote a memorandum to the City Manager suggesting that it would now be appropriate to repeal the Special Exception in light of the revocation of the Building Permit. (The City Manager Jim Soderlund was the former Fire Chief at the time the Fire Department raised the water pressure issue with Mr. Hollohazy. The City Attorney Donald Roberge is the same attorney who supervised much of the City's dilatory litigation in the 1970's.)

One week later, on June 12, 1985, the City Manager wrote a memorandum to the Director of Planning, Fred Kleingartner (the same Mr. Kleingartner who was the former Community Development Director and opposed the project back in the 1970's along with Fletcher Riley). In that memo, he stated:

> "Fred, attached is a memorandum I received from the City Attorney regarding the Yardarm Inn."
>
> "As soon as possible, I would like you to take the lead and have an ordinance prepared which will repeal the ordinance [the Special Exception for

> 18 stories] currently in effect. I see no need to take this first to a workshop; therefore, please ensure that it is advertised for a public hearing."
>
> "Further, the Building Department will *not* issue permits for structures higher than ten stories."

The directive that the Building Department "will *not*" issue permits for structures higher than ten stories was illegal. The 18 story Special Exception was still active. Court orders that the February 14, 1974 regulations applied were still in effect. Only the Building Official, and not the City Manager, had the legal authority to issue building permits and/or refuse to issue building permits.

In early July, 1985, Yardarm contacted the Building Official to inquire as to the deadline for re-issuance of the permit, at which time it was unaware of the movement underfoot to repeal the Special Exception. The Building Official responded by letter of July 10, 1985, in which he advised that the date to obtain a new permit would expire on October 30, 1985. At this time, however, he did *not* apprise Yardarm of the City's ongoing efforts to repeal the Special Exception.

On July 15, 1985, five days after the Building Official's letter to Yardarm, the City Manager wrote the Building Official a memorandum and stated:

> "The City Attorney wants to know what happened to the repeal of the ordinance allowing the Yardarm to exceed 10 stories?"

One week later, on July 22, 1985, the Building Official responded with a memorandum and a proposed ordinance calling for the repeal of Ordinance 73-96 – Yardarm's 18

story Special Exception. The proposed Ordinance repealing the 18 story Special Exception recited that 30 days' notice had been given Yardarm.

> "*WHEREAS*, pursuant to law, fourteen (14) days' notice has been given by publication in a paper of general circulation in the city and *thirty days' notice has been given to each real property owner whose land will be affected* by enactment of this ordinance . . .
>
> "*WHEREAS*, public hearings before the City Commission were held pursuant to the notices described above at which hearings the *parties in interest* and all other citizens so desiring *had an opportunity to be and were in fact heard*, now therefore . . . " (emphasis supplied)

No such notice was given to Yardarm. The proposed repealer Ordinance was set for the next commission meeting on September 3, 1985.[4]

***The Foleys' Testimony***: The Foleys were the next door neighbors and friends of Commissioner Gomes. They testified about a telephone conversation between Commissioner Gomes and Commissioner Flynn the night before the September 3, 1985 meeting, where the Commissioners were planning their repeal of Yardarm's 18 story Special Exception.

Commissioner Gomes was elected in 1983 and served as Commissioner until 1990. In the early years, he had a

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[4] In Pompano Beach, no City Commission meetings are held during the month of August. Following the August break, the next City Commission meeting was scheduled for September 3, 1985.

close relationship with the Foleys. This relationship later deteriorated. Both of the Foleys testified that Commissioner Gomes and fellow City Commissioner Tom Flynn met regularly on Sunday mornings during 1983, 1984 and 1985 at the Foley residence to discuss City business, politics and matters on upcoming agendas. They often discussed the Yardarm project and their animosity toward the project, their hatred of the Yardarm owner, their strategies on how to stop the project, and that they would do whatever they could to stop the hotel.

Although Gomes denies these conversations, the Court finds the Foleys' testimony to be more credible, particularly in light of Gome's erroneous description of the location of his phone and the physical layout of the kitchen, which were unequivocally refuted by actual photographs.

***September 3, 1985 Meeting and Subsequent Events:*** The first reading of the Ordinance repealing the Special Exception took place on September 3, 1985. At the September 3 meeting, Commissioner Olsen questioned the fact that Yardarm had not been given notice of the hearing and the Clerk advised all Commissioners that they had not. Notwithstanding they passed first reading by vote of 4-1, with only Commissioner Olsen dissenting.

On September 4, the City Attorney had misgivings and wrote a memo advising that they had probably been proceeding incorrectly and that actual notice probably should have been given the property owner. The second reading was then scheduled for October 29, 1985. The City did later send notice on October 21, 1985 (received October

25), but kept the reading on track for October 29, notwithstanding that the required 30 day notice to the property owner had not been given.

In the meantime, Yardarm was still unaware of the proposed repealer Ordinance. On October 10, 1985, Yardarm submitted its consolidated plan for construction covering both parcels. Due to the pending Ordinance to repeal the Special Exception which had been secretly rushed through the system, the City simply ignored the application, which lay untouched in a corner of the Building Official's office, among the trash and refuse.

### E. Late 1985, Early 1986 – Yardarm Meets the Deadline; Stall of the Plan Review; Death of the Yardarm Project

Once Yardarm learned that repeal of the Special Exception was under consideration and with its permit deadline two days away, Yardarm filed suit to enjoin the Pompano Beach City Commission from voting to repeal the eighteen story ordinance. This case was assigned to Judge Lee, who granted a preliminary injunction on October 28 and later a permanent injunction on November 20, 1985. The City appealed.

According to Mr. Reilly the project architect, the City essentially stalled and delayed the plan review during this period from October 10, 1985 and through early 1986. He was told that officials "were not in" when he tried to discuss the plans; two months after the submission of the application, the City wrote that the application was missing a $150.00 fee; the project was left off agendas; and clerks "could not remember" the application. Notably, on October 31, 1985, the Planning Director had written a

letter stating that the City would require further plan revisions if the repealer Ordinance was enacted prior to issuance of the permit. Also, in October, 1985 the Planning Director made inquiry to Yardarm as to whether Yardarm would sell its property to the City.

While the City slowly processed the application, a final judgment of foreclosure against Yardarm was entered on February 20, 1986, with a sale set for March 21, 1986. On March 4, 1986, when it was too late, the City's Planning Board finally gave tentative site plan approval, subject to a variety of conditions, which were impossible to meet.

Although the foreclosure was stayed for awhile by a Chapter 11 bankaruptcy [sic], the City's appeal of the injunction was effective. Under the circumstances, securing financing was impossible and sale of the property was unrealistic. Ultimately, in 1987 the Fourth District reversed the injunction, declaring that it was inappropriate to permanently enjoin the City from holding a hearing on the issue. Although, by that time the point was moot as the project was finally dead.

As was previously noted by Judge Ward, the ironic end to this sorry saga was that the City ultimately purchased the land after the foreclosure from the FDIC. The price was $3,750,000; Yardarm estimates that the land was worth at least $6.2 million.

### F. Yardarm's Reliance Expenditures During 1980 Through 1986

From 1981 through 1985, Yardarm had kept its permit active by continuing the piling construction – albeit

at a slow and intermittent pace. The expenditure on hard construction in the 1980's was in excess of $200,000. With the earlier construction, the total "hard" costs amounted to $780,000.

In addition, Yardarm also continued to invest in the project during the 1980's by way of "soft costs" in architectural and engineering expenses, plan revisions, feasibility studies (Laventhal & Horwath, Pennell, Kerr, Forster), appraisal fees, financing commitment fees, project manager and development team salaries and adding the west parcel to the project – which at the end exceeded $1,300,000. Notably, not an insignificant amount of the "soft costs" involved redrawing plans for submission on October 10, 1995, at a time when the City knew, but kept secret, its plans to repeal the 18 story Special Exception.

## CONCLUSIONS OF LAW

Prior to 1987, neither the federal nor state courts recognized a cause of action for damages for improper land use regulations. Only injunctive and declaratory relief was available. That changed on June 9, 1987 with the historic decision of *First English Evangelical Church vs. City of Los Angeles*, 482 U.S. 304 (1987), *cert. denied*, 493 U.S. 1056 (1990). This case opened the doors to inverse condemnation claims for regulatory land use takings. In 1990 Florida followed suit with *Joint Ventures, Inc. vs. Department of Transp.*, 563 So.2d 622 (Fla. 1990). Since 1987, there have been several types of constitutional claims advanced in land use cases including:

(a) Procedural due process – Fourteenth Amendment

(b) Arbitrary and capricious substantive due process – Fourteenth Amendment

(c) Just compensation Takings Claims – Fifth Amendment

*Restigouche, Inc. vs. Town of Jupiter*, 59 F.3d 1208, 1211 (11th Cir. 1995).

## A. Fifth Amendment – Unconstitutional Taking

Under the Fifth Amendment, the state must compensate the landowner only where the regulation deprives a landowner of all economically beneficial or productive use of land. *Lucas vs. South Carolina Coastal Council*, 112 S.Ct. 2886, 2893 (1992). In the *Yardarm* case, the District Court of Appeals ruled that there was no permanent taking based on the obstructionist tactics of the City and improper abuse of its permitting power because the City had not deprived Yardarm of "all use" of its property; rather it had simply deprived Yardarm of one use – its right to build the 18-story hotel. *City of Pompano Beach vs. Yardarm Restaurant, Inc.*, 641 So.2d 1377 (Fla. 4th DCA 1994), *cert. denied*, 115 S.Ct. 2583 (1995).

However, the Fourth District Court recognized that Yardarm was not without a monetary remedy. Its claim was appropriate for a due process analysis:

> Here, the lower court determined that the City's actions were 'illegal,' 'arbitrary and capricious,' 'not taken to promote the public's health, safety or welfare,' 'frivolous,' 'dilatory' and a 'usurpation of authority.' *Although speaking in terms of a 'taking,' the fact findings of the lower court are a classic expression of a denial of due process . . . The lower court correctly perceived that the law*

> *provides a remedy for such conduct . . .* If *an invalid exercise of police power causes damage not amounting to a 'taking,' the claim is for a violation of substantive due process and the remedy is monetary damages.*

*Pompano vs. Yardarm*, 641 So. 2d at 1385 (citations omitted) (emphasis supplied).

Accordingly, this lower tribunal reinstated Count II of Plaintiff's complaint based upon a violation of the 14th Amendment arising under 42 U.S.C. §1983. It is upon those legal principals that this case was tried.[5]

**A.** [sic] **42 U.S.C. §1983 – Due Process.**

The Civil Rights Act of 1964, 42 U.S.C. §1983, is the enabling statute which creates a private right of action for monetary relief for a deprivation of a constitutionally protected right by a person acting under color of state law. In the land use context, the federal right secured is founded generally in the 14th Amendment – within the due process clause.

***1. Due Process – The Two Prong Approach.*** In analyzing a due process claim, the courts utilize a two-prong test. First, the plaintiff must establish a deprivation

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[5] This Court also reinstated Count I, the takings claim. This Court believes that the facts presented support a taking a takings [sic] claim based upon principles not previously addressed by the District Court, especially in light of the newly discovered evidence. That belief, however is not determinative because the facts presented here also fully support a claim under 42 U.S.C. §1983 for due process (substantive and procedural).

of a constitutionally protected interest, i.e., "property" within the meaning of the Fourteenth Amendment. Second, the plaintiff must show that the deprivation is a result of an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation, i.e., "deprivation of due process" without the meaning of the Fourteenth Amendment. *Greenbriar, Ltd. vs. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989).[6]

The second prong is further broken down into either a procedural due process violation or a substantive due process violation. *C.F., Zinermon vs. Burch*, 110 S.Ct. 975, 983 (1990).

***2. Prong One – Whether Yardarm had a "property interest" in its building permits and special exception permit.*** Traditionally "the first inquiry for Section 1983 is whether the defendant deprived the plaintiff of a constitutionally protected property right." *Key West Harbour Development Corp. vs. City of Key West*, 987 F.2d 723, 727 (11th Cir. 1993). In the land use context, the issuance of a permit under state law creates a "mutually explicit understanding" that a person is entitled to build what is permitted. Under Florida law, a citizen has a due process property interest in a building permit after having changed his position or spent large sums of money in

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[6] This two-prong analysis has been applied in a number of Eleventh Circuit land use decisions in the later 1980's and 1990's. See *MacKenzie vs. City of Rockledge*, 920 F.2d 1554, 1558 (11th Cir. 1991); *Spence vs. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989); *Hearn vs. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir. 1982); *Executive 100, Inc. vs. Martin County*, 922 F.2d 1536, 1541 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 55 (1991).

reliance thereon. *Reserve, Ltd. vs. Town of Longboat Key*, 17 F.3d 1374, 1380 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 729 (1995).[7]

Also, a property interest has been found to exist when a property owner seeks a permit that the government has no discretion but to issue. *See Corn vs. City of Lauderdale Lakes* ("Corn IV") 771 F.Supp. 1557 (S.D. Fla. 1991), *aff'd in part, rev'd in part*, 997 F.2d 1369 (11th Cir. 1993) (Property interest in building permit found because City lacked discretion to deny the permit. "Lack of discretion to deny is key.")

These doctrines prevail in this case. In reliance upon the special exception approvals and building permit, Yardarm demolished a successful restaurant and invested millions of dollars. A variety of judges have ruled again and again that the City of Pompano lacked discretion to deny Yardarm its permits. The City was under Court order to apply the February 14, 1974 standards to this property and had no discretion in the matter, unless it applied to the Court for relief.

***3. Yardarm Did Not Abandon Vested Rights in 1980's.*** Here, the City argues that Yardarm abandoned its vested right when development was delayed from 1981 to 1985. What the City ignores is that much of the delay was

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[7] Property interests traditionally arise from vested zoning and permit rights. *Marine One, Inc. vs. Manatee County*, 877 F.2d 892, 894 (11th Cir. 1989). See also *Wheeler vs. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990) (vested rights in plan approvals and building permits); *A.A. Profiles, Inc. vs. City of Fort Lauderdale*, 850 F.2d 1483 (11th Cir. 1988) (vested rights in zoning and permitting), *cert. denied*, 109 S.Ct. 1743 (1989).

due to the City's actions from 1973 through 1981, which caused the lenders to shy away from this now tainted project. Equity requires some recovery time. Thereafter, Yardarm continued incurring construction costs and further development costs for feasibility studies and further acquisition while it sought venture partners and financing. Ultimately, in 1985 when the City nullified the permit, it hid its undisclosed strategy to also revoke the Special Exception. Instead, the City advised Yardarm that the permit could be reissued within 180 days if current building regulations were met. In reliance upon the City's 1985 representations, Yardarm again prepared revised plans, paying large sums of money to architects, mechanical engineers, structural engineers and air conditioning engineers to meet the October 30, 1985 deadline.

The Court finds that there was sufficient governmental action and reliance thereon to create vested rights and protected property interest in 1985. This is not a case where the City announces a change in zoning and a property owner hurriedly tries to apply for development under old regulations, having done nothing previously. Exactly the opposite is the case at hand where the strategy for the repealer Ordinance was kept secret and the property owner proceeded in good faith. *C.F., City of Boynton Beach vs. Carroll*, 272 So.2d 171 (Fla. 4th DCA 1973), *cert. denied*, 279 So.2d 871 (Fla. 1973).

***4. Prong Two – Whether substantive due process has been denied.*** Deprivation of a property interest rises to the level of a substantive due process violation if done for improper motives and achieved through means that

are arbitrary, capricious, and lacking any rational basis. *Spence vs. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989).[8]

Here, the Commissioners were acting arbitrarily for political and personal reasons. They were told time and time again that February 14, 1974 regulations applied, but circumvented these court orders continuously. The protracted litigation in the 1970's was unreasonable, arbitrary and conducted in bad faith. Many of the same high officials were still involved in the 1980's, when the obstructionist tactics continued.

In 1985, shortly after foreclosure was filed, without applying to the Court for relief from the earlier judgments, the City suddenly revoked the permit and unilaterally applied the current regulations directly contrary to Court orders, but giving Yardarm 180 days to reapply under current regulations. At the same time, the City kept the repealer Ordinance a secret for months and deliberately failed to give Yardarm notice until four days before the second reading. After Yardarm met the October deadline for new plan submission, the City further stonewalled for five months in their review giving the Building Official private orders not to allow anything over 10 stories.

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[8] See also *Greenbriar*, 881 F.2d at 1577; *Executive 100*, 922 F.2d at 1541; *Hearn*, 688 F.2d 1328, 1332; *Eide vs. Sarasota County*, 908 F.2d 716, 720-21 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 1073 (1991); *Reserve, Ltd. vs. Town of Longboat Key*, 17 F.3d at 1380-81; *Resolution Trust Corp. vs. Town of Highland Beach*, 18 F.3d 1536, 1549 (11th Cir. 1994) *opinion vacated*, 42 F.3d 626 (11th Cir. 1994).

***5. McKinney vs. Pate – The City's Defense to Substantive Due Process.*** The City relies upon *McKinney vs. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), *cert denied*, 115 S.Ct. 898 (1995), in an attempt to avoid liability for its egregious and concerted activities to block the Yardarm project and deprive its owners of constitutionally protected and vested property rights.

The *McKinney* court questioned the applicability of the United States Constitution to a simple administrative termination of a county employee where a full hearing had been afforded, concluding that the Eleventh Circuit misconstrued the Supreme Court teachings on substantive due process. The substantive component of the due process clause, according to *McKinney*, protects only "fundamental rights," i.e. those which are "implicit in the concept of ordered liberty" and specifically enumerated in the Bill of Rights, but not mere "state created" rights. *Id.* at 1556. The *McKinney* court concluded that vested rights in employment created by an employment handbook are merely "state created" (not "fundamental") and therefore do not enjoy substantive due process protection.

> As a result, these state law based rights constitutionally may be rescinded so long as the elements of procedural – not substantive – due process are observed.

*Id.* at 1560.

Since 1994 arguments have been made (and accepted by the courts) that the *McKinney* "state created" rights principle applies to the ordinary land use case involving an erroneous administrative decision or an erroneously revoked permit. The right to use one's property in a

particular fashion is at best only a "state created" right, not a fundamental right.[9]

Those cases applying *McKinney* deal only with "run-of-the-mill" administrative acts. After careful review, this Court has determined that *McKinney* is not applicable to the case at hand because:

(1) This case involves legislative acts, not ministerial or administrative errors;

(2) This case involves egregious and deliberate acts orchestrated by members of the highest legislative body of the city, under extreme circumstances involving bad faith and institutional bias;

(3) The rights involved in this case are more fundamental than mere employment interests; and

(4) This case further implicates procedural due process, which has not been abrogated by *McKinney*.

Important to this case is the acknowledgment in *McKinney* that there are, indeed, many exceptions to its newly announced limitation on substantive due process protections. When the situation involves more than an

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[9] See *Sullivan Properties, Inc. vs. City of Winter Springs*, 899 F.Supp. 587, 594-95 (M.D. Fla. 1995); *Reserve, Ltd. vs. Town of Longboat Key*, 933 F.Supp. 1040, 1042-43 (M.D. Fla. 1996) on remand from 17 F.3d 1374 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 729 (1995); *Baggs vs. City of South Pasadena*, 947 F.Supp. 1580 (M.D. Fla. 1996); *Jacobi vs. City of Miami Beach*, 678 So.2d 1365, 1366-67 (Fla. 3rd DCA 1996); *Kantner vs. Martin County*, 929 F.Supp. 1482, 1486-87 (S.D. Fla. 1996), *aff'd*, 142 F.3d 1283 (11th Cir. 1998); and *Boatman vs. Town of Oakland*, 76 F.3d 341 (11th Cir. 1996).

administrative termination or permit revocation substantive due process still applies. This especially is true where the deprivation is "legislatively" affected, or there is egregious conduct by high policy makers, or more fundamental rights involved. Indeed, *McKinney* did not eviscerate all Eleventh Circuit substantive due process precedent.

> "[T]here continue to be rights that a state may not remove, regardless of the process, as well as actions that cannot be countenanced, regardless of the appropriateness of the process."

*McKinney*, 20 F.3d at 1560, n.15. See in particular the discussion in *McKinney* as to "fundamental rights" (*Id.* at p. 1556-58), governmental conduct which "shocks the conscience" (*Id.* at p. 1556 n. 7), rights that have been "incorporated" against the state because they are "implicit in the concept of ordered liberty" (*Id.* at 1556 n. 8), and the "legislative" vs. "administrative" distinction (*Id.* at 1557 at n. 9). These footnoted exceptions are most important to the case at hand.

***6. The McKinney Exceptions.*** This Court simply does not accept the proposition that Yardarm has no remedy and that *McKinney* killed all due process protections. Indeed, the exceptions acknowledged in the *McKinney* footnotes form the basis for a tempered middle-ground approach, which protects a citizen from concerted abuse and misuse of the court system by local government and arbitrary acts of the highest governmental body, but also protects the well-meaning municipality from the multi-million dollar lawsuit by an overly zealous developer, in a case of a simple erroneous administrative decision, which can easily be corrected on appeal or by certiorari.

*City of Pompano vs. Yardarm* was decided six months *after McKinney*. The Court found that substantive due process is a viable cause of action.

> The fact findings [by Judge Ward] are a classic expression of a denial of due process . . . If an invalid exercise of police power causes damage not amounting to a taking, the claim is for violation of substantive due process and the remedy is monetary damage. *Id* at 1385.

The Fourth District Court has recently rejected *McKinney* in *Gardens County Club, Inc. vs. Palm Beach County*, 712 So.2d 398 (Fla. 4th DCA 1998) holding:

> Although the *McKinney* court determined that . . . substantive due process protection did not include rights created by state law only, it specifically limited its holding to "executive acts" and found that its analysis regarding the substantive/procedural distinction would be "inappropriate" for "legislative" acts . . . Thus, we reject the County's reliance on *McKinney*.

As the Fourth District noted, the 11th Circuit has specifically acknowledges that due process is still a viable theory for monetary relief in the land use context for legislative down zoning involving arbitrary and capricious conduct. See *Villas of Lake Jackson, Ltd. vs. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997).

In addition substantive due process still protects against "bias and bad faith" and "egregious and shocking behavior" on the part of high governmental officials, especially where there is institutional bias and conflicts of interest. 16B Am. Jur. 2d *Constitutional Law*, §917. This is especially true where state conduct involves a substantial infringement of state law prompted by personal or

group animus or a deliberate flouting of the law that trammels significant personal or property rights. 16B Am. Jur. 2d *Constitutional Law* §918. The due process clause serves as a check on official misconduct and serves as a vehicle to limit potentially oppressive government action.

In its earlier opinion reversing in this case, the Fourth District cited *Bello vs. Walker*, 840 F.2d 1124 (3d Cir. 1998), *cert. denied*, 109 S.Ct. 176 (1988), which is appropriate. *Bello* involved arbitrary development delays caused by Council interference with the administrative permitting process, motivated by political and personal reasons:

" . . . [C]ertain council members, acting in their capacity as officers of the municipality improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits. These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under Section 1983."

*Id.* at 1129-30.

***7. City's Reliance on Coconut Creek Misplaced; McKinney Exceptions Apply.*** The City argues that most of the activity – permit revocation, stonewalling delays, etc. – was by the Building Official and various employees, not the Commission. The City relies upon *Raben-Pastal vs. City of Coconut Creek*, 573 So.2d 298 (Fla. 1990), *cert. denied*, 112 S.Ct. 58 (1991), which holds that the City cannot be liable for a building official's decision to issue a stop work order. A city is only liable if the official is acting in accordance with governmental policy or custom. However, as the *Coconut Creek* court notes, the governmental

custom or policy need not be formally sanctioned or ordered, so long as it represents the will of the "policy makers." *Coconut Creek* is in accord with the *McKinney* exceptions for "legislative" action.

This is not a simple case of an honest administrative error or misinterpretation by an administrative official. Here, there was concerted action by the highest legislative body, the Commissioners themselves. As Commissioner Olsen testified, there was an unstated "policy" to kill the Yardarm project. The Commissioners legislatively downzoned the property and passed new ordinances in the 1970's calling for more stringent height limitations and setbacks. In 1985, the City Attorney and City Manager, with the Commission's approval, interfered with the Building Official and coordinated the permit revocation. They insisted upon the application of the later adopted ordinances to Yardarm's project, notwithstanding court orders to the contrary.[10] Throughout 1983, 1984 and 1985, Commissioners Gomes and Flynn met on Sunday mornings at the Foleys' residence to plan how to stop Yardarm. Finally, in 1985, they met secretly to plan the legislative repeal of the Special Exception while Yardarm was trying to meet the October 30, 1985 deadline.

Also, the "fundamental rights" exception found in *McKinney* applies. While Yardarm's permit rights were

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[10] *McKinney* at note 9 cited to *Harrah Ind. School District vs. Martin*, 440 U.S. 194 (1979) as a legislative exception. In *Harrah*, the School District applied new rules pertaining to continuing education to *Harrah* in refusing to renew her contract. As *McKinney* noted, the application of those rules caused the court to examine the case as one involving a legislative act. The same principle applies here.

only "state created" and not constitutionally "fundamental", Yardarm ended up losing its property altogether. The City bought it at a fraction of its value. While this was not planned from the beginning in the 1970's, a reasonable inference arises that there was some motivation to this effect when the City stonewalled the project in the 1980's while foreclosure was eminent – especially when the Planning Director made inquiry in 1985 as to whether Yardarm would sell its property to the City. Clearly some aspect of the Fifth Amendment is implicated by the stonewalling, even if a full-fledged takings claim may not exist.[11] The Fifth Amendment involves "fundamental" rights deserving of due process protections, not just state created rights.

***8. Prong Two – Whether Procedural Due Process has been denied.*** Again, the City relies primarily on *McKinney vs. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 898 (1995), to avoid a claim under 42 U.S.C. §1983 for violation of procedural due process.

In *McKinney*, notwithstanding claims of biased hearing officers, the employee was afforded a full *pre*-termination hearing including written notice, specified charges, presence of counsel, rights to cross examination, and a three day hearing. McKinney also had an available

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[11] See *Askew vs. Gables-by-the-Sea, Inc.*, 333 So.2d 56 (Fla. 1st DCA 1976), *cert. denied*, 345 So.2d 420 (Fla. 1977) (13 years of bureaucratic delays and protracted litigation causing permit to expire, court orders defendant to institute inverse condemnation procedures) and *Hollywood Beach Hotel Co. vs. City of Hollywood*, 329 So.2d 10 (Fla. 1976) ("City sought to accomplish by delay that which it could not accomplish by immediate rezoning.")

quick appellate remedy (a state certiorari review procedure based on the record below) to address his charges that the pre-deprivation hearings were tainted and biased. The Eleventh Circuit correctly held that the overall procedures given McKinney were basically fair because, even if the initial proceedings were biased, he had an adequate, quick post-deprivation remedy provided by the state.

Here, the City claims that the administrative and judicial appellate process adequately provides Yardarm with adequate procedural due process. The City is simply wrong. *McKinney* did not clear a path for the City to hold secret meetings to discuss plans to kill the Yardarm project, and to revoke permits and apply new standards without notice, and to hide its undertakings to revoke the Special Exception. *McKinney* did not authorize disregard and circumvention of judicial directives and the litigation abuse as demonstrated in this case.

Under Florida law, "procedural due process attaches to zoning actions which alter the manner in which a property owner can use his or her land". *First Assembly of God vs. Collier County*, 20 F.3d 419, 422 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 730 (1995). Procedural due process requires adequate notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Boddie vs. Connecticut*, 401 U.S. 371, 378 (1971). The "root requirement" of the Due Process Clause is that "an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations . . . " Id. at 379. See also *Logan vs. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982); *Zinermon vs. Burch*, 494 U.S. 113, 132 (1990). A deprivation of procedural due process can also give rise to a

damage claim in addition to a remand for hearing where yet another hearing will not provide relief. *Carey vs. Piphus*, 435 U.S. 247 (1978).

In this case, little or no notice was given in advance of activities which had substantial impact on Yardarm's property. There was *no notice* given of the secret Sunday morning meetings between Commissioners Gomes and Flynn at the Foley house; there was no notice of the clandestine telephone calls between Commissioners; there was no warning before the City's revocation of the permit; there was no hearing before directions were given to the Building Official to ignore Judge Wehle's earlier judgment that February 14, 1974 regulations were to apply; nor was there notice of the plan to repeal the Special Exception in late 1985.

There was no procedure to provide relief in a *meaningful time*. The City's abuse of the process for 15 years goes beyond the normal litigation path and far beyond the normal permitting delays. The City has constantly *abused* the very process which is theoretically designed to protect Yardarm (certiorari proceedings, declaratory judgment matters, etc.). Instead of acquiescing to legitimate and well-reasoned court orders, the City deliberately disobeyed those orders, requiring Yardarm to resort again and again to additional lengthy, protracted and expensive lawsuits and appeals. There was the obvious stonewalling of the application to have the permit reissued until the foreclosure sale in early 1986. The City's litigation tactics were funded by a seemingly unlimited litigation budget, unlike Yardarm which went deeper into debt and was ultimately subjected to foreclosure and bankruptcy. No court could adequately address the harm which has befallen Yardarm during the litigation process.

## C. City's Affirmative Defenses

The City raises a variety of defenses including statute of limitations and res judicata, "law of the case", collateral estoppel and lack of proximate cause of its damages.

***1. Proximate Cause.*** As to proximate cause, the City argues that Yardarm's damage was caused by its own business decisions (expanding the hotel plans, including the west parcel, inept financing efforts, poor planning, starting construction before having dock permits, etc.) Whether the business decisions, as opposed to the City's actions, were the proximate cause of damage to Yardarm are properly determined by a jury at the damage trial. The proximate cause of damage is not relevant to the determination that the City acted improperly and deprived Yardarm of due process. After 12 years of prolonged litigation, stonewalling, and secret planning by the City Commissioners, with an admitted "policy" to kill the Yardarm project, Yardarm ended up bankrupt and the City ended up with the property at a bargain price. Certainly, there is sufficient evidence of deprivation of rights to send the damage issue and proximate cause thereof to the jury.

***2. Statute of Limitations.*** The Fourth District has ruled that the City's "taking", if any, for Fifth Amendment purposes ceased in 1981 when the building permit was reissued. Therefore, the taking claim, if any, was time barred when suit was brought in 1987. *City of Pompano vs. Yardarm*, 641 So.2d at 1386. Yardarm concedes that the statute of limitations is four years.

The Court finds that there is not a statute of limitations problem. First, the City's activities from 1983 to 1986, in and of themselves, constitute a deprivation of due process. Second, the City's due process deprivations were

"continuous" in nature, the ultimate damage resulting from the compound effect of the City's actions over the years, rather than one specific act, much like continuous exposure to a toxic substance.

Even if there is not a "continuous" violation, evidence of unconstitutional conduct occurring *prior* to the limitations period is admissible. *Turner vs. Upton County, Texas*, 967 F.2d 181, 185 (5th Cir. 1992). (Although plaintiff cannot recover damages for activities outside limitation period, such evidence is admissible in considering impact of later activities in §1983 action.) Indeed, the City's activities from 1983 through 1986 cannot be examined in a vacuum or isolation. In light of the City's earlier obstructionist tactics, the City should have later provided greater care and assistance. The City's earlier wrongful conduct put Yardarm in its precarious position.

As to the "continuous" violation doctrine, a §1983 claim can be timely even though the claim alleges unlawful acts which occurred outside the limitations period. Recovery may be had for acts barred by the statute of limitations, if a substantial nexus between the violation within the limitations period and the older, time-barred acts. *United Air Lines, Inc. vs. Evans*, 431 U.S. 553 (1977); *Whiting vs. Traylor*, 85 F.3d 581 (11th Cir. 1996); *Brown vs. Walt Disney World Co.*, 805 F. Supp. 1554 (M.D. Fla. 1992). Although the "continuing violation" doctrine is most often encountered in discrimination cases, it applies to permit denials as well. See, *Sameric Corp. of Delaware, Inc. vs. City of Philadelphia*, 142 F.3d 582 (3d Cir. 1998); *Deepwells Estates Inc. vs. Incorporated Village of Head of Harbor*, 973 F. Supp. 338 (E.D. N.Y. 1997), *appeal dismissed*, 162 F.3d 1147 (2d Cir. 1998).

Here, the subject matter of the unconstitutional acts are the same – stonewalling and revocation of the building permit while the Commission attempted legislation to repeal the Special Exception. As Commissioner Olsen testified, there was a continuing "policy" to kill the Yardarm project from the 1970's which carried forward into the 1980's. The City was relatively quiet from 1981 through 1983 simply because Yardarm was essentially in the process of "regrouping". The 1984 and 1985 obstructionist tactics (culminating with permit nullification and an attempted repeal of the Special Exception) were a continuation of the earlier activities. Indeed, many of the same players were involved. Lastly, the degree of permanent damage – the fact that the project was finally dead – was not fully realized until Yardarm ultimately lost the property.

The City argues that Yardarm knew full well of the damages and violation of constitutional rights when it filed the Petition for Supplemental Relief on July 6, 1979 dealing with the second revocation. However, this suit was voluntarily withdrawn when the Broward County Board of Rules and Appeals ordered the permit to be reinstated. No hearings were ever held in that case. In 1979 Yardarm could not be expected to anticipate the continuing violations and the compound effect on its development.

***3. Res Judicata; "Law of the Case"; Collateral Estoppel.*** Lastly, the City's res judicata argument is of no avail. In 1994, the Fourth District remanded this case to try the §1983 claim on the merits. A full record was

available at that time for the court to rule on the basis of res judicata or statute of limitations theories.[12]

The City also relies upon the 1987 Fourth District opinion which overruled Judge Lee's permanent injunction against the City conducting hearings to consider repealing the Special Exception. The District Court held that twelve years have elapsed since the special exception was granted. It was appropriate that the zoning authority be given the opportunity to consider anew the effect of the continuation of the special exception. *City of Pompano Beach vs. Yardarm Restaurant, Inc.*, 509 So.2d 1295 (Fla. 4th DCA 1987). It is true that in the same opinion, the appellate court also discussed an estoppel argument. The City now argues that this issue has now been conclusively decided and seeks to apply res judicata, etc. However, in that earlier case, the lower court had ruled after a simple one hour hearing. Although estoppel arguments were

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[12] The City relies upon *Albrecht vs. State*, 444 So.2d 8 (Fla. 1984) and *Key Haven Associated Enterprises, Inc. vs. Bd. of Trustees*, 427 So.2d 153 (Fla. 1982). These cases deal with a declaratory challenge to agency action seeking injunctive relief, not damage lawsuits. Prior to *First English* and its progeny, there were two types of constitutional challenges available to contest agency action. Under the Fifth Amendment, the action could be declared invalid having gone too far so as to be a taking, although *for a proper public purpose*. Alternatively, the action could be challenged as violative of the Fourteenth Amendment, being arbitrary, capricious and *not for a public purpose*, exceeding the state's police powers. The two concepts are mutually exclusive.

These concepts are inapplicable here for several reasons. First, the District Court has found no taking and it is appropriate to plead §1983 due process deprivation in the alternative. Under *Patsy vs. Board of Regents*, 457 U.S. 496 (1982), there is no requirement to exhaust all administrative remedies as a prerequisite to a §1983 action. In any event, further exhaustion was futile.

made on the appellate level, those issues were *not* tried below. The facts concerning Yardarm's reliance and expenditures from 1981 through 1983 were not fully developed, and Yardarm was unaware of the activities of the highest officials throughout 1985. The context (injunction against City holding a hearing) was entirely different than the context of establishing a "property interest" protected by the Fourteenth Amendment.

Florida law is well settled that the doctrines of res judicata and collateral estoppel only apply to issues actually litigated in prior proceedings. *Dept. of H.R.S. vs. B.J.M.*, 656 So.2d 906 (Fla. 1995); *Kozich vs. Unemployment Appeals Commission*, 676 So.2d 487 (Fla. 4th DCA 1996), *cause dismissed*, 686 So.2d 579 (Fla. 1996); *Gazie vs. John Hancock Mutual Life Insurance Company*, 632 So.2d 1076 (Fla. 4th DCA 1994).

Further, even if the technical elements of res judicata or collateral estoppel are found to exist, courts will not apply those doctrines where injustice would occur. *deCancino vs. Eastern Airlines, Inc.*, 283 So.2d 97 (Fla. 1973). Clearly, an injustice will occur should this Court apply res judicata or collateral estoppel to prevent plaintiff from raising its valid, legal claims under 42 U.S.C. §1983.

## CONCLUSION

Having heard all of the evidence, having read the Memorandums of Law, and having heard the argument of counsel and being fully advised in the premises, the Court specifically finds:

1. That the Defendants deprived the Plaintiff of a constitutionally protected right.

2. That the deprivation of the Plaintiff's property interest was done for improper motives and that the protracted litigation between 1972 and 1981 was unreasonable, arbitrary, and conducted in bad faith and said conduct continued between 1983 and 1986 by Pompano Beach City Commissioners who acted so arbitrarily, irrationally, and tainted by improper motives, including partisan, political, and personal reasons unrelated to the merits of the application for the premises, which in this Court's opinion constituted a violation of substantive due process in violation of 42 U.S.C. Sec. 1983 for which the remedy is monetary damages. *Bello v. Walker, 840 F.2d 1124 (3rd Cir.), cert. denied, 488 U.S. 868, 109 S.Ct. 176, 102 L.Ed.2d 145 (1988).*

3. That the actions of the City of Pompano Beach were orchestrated by members of the highest legislative body of the City, involving bad faith and institutional bias which constituted legislative acts and therefore the case of *Millard McKinny vs. John Pate, et al, 20 F.3rd 1550 (11th Cir. 1994)* is not applicable. See *Garden Country Club vs. Palm Beach County, 712 So.2d 398 (Fla. 4th DCA 1998).*

4. That the continuing violation doctrine applies in that the violations of the City of Pompano Beach Commissioners between 1983 and 1986 have a substantial nexus with those violations between 1972 and 1981, which evidenced an ongoing discriminatory policy and practice so that this suit filed in 1987 was timely and the four year statute of limitations does not apply. *Deepwells Estates, Inc. and Nicholas Peteavany v. Incorporated Village of Head of the Harbor, et al, 973 F.Supp. 338* and cases cited therein.

For the reasons stated, the Court finds that there was a deprivation of Yardarm's civil rights in violation of 42 U.S.C. §1983; that a jury shall be impaneled to make its findings relative to the issue of damages suffered; that the City shall be responsible for payment of reasonable costs and attorney's fees pursuant to 42 U.S.C. §1988; that the hearing regarding reasonable attorney's fees and costs shall be heard after the conclusion of the damage trial.

DONE AND ORDERED this ___ day of _____, 1999.

W. HERBERT MORIARTY
A TRUE COPY FEB 23 1989
Honorable W. Herbert Moriarty
Circuit Court Judge

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Attached Counsel List

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**Yardarm Restaurant v. City of Pompano Beach**
**Case No: 87-19652(18)**

## APPENDIX A

## LITIGATION CHRONOLOGY

**1. 1973 – The First Lawsuit Over the Special Exception – Judge Gonzalez**

November 16, 1973 *Hillsboro Shores Improvement Association v. City of Pompano Beach and Yardarm* – Complaint for Declaration of Rights and Injunctive Relief filed Case No: 73-14220 (Judge Gonzalez) (Yardarm as Intervenor)

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| December 15, 1975 | Final Judgment by Judge Gonzalez declaring valid Special Exception Use #73-96 in Hillsboro Shores v. City of Pompano and Yardarm. Case No: 73-14220 |

**2. 1974 – The Lawsuit to Reinstate the Building Permit – Judge Wehle**

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|---|---|
| June 5, 1974 | *Yardarm v. City of Pompano Beach* Complaint seeking to have Yardarm Building Permit reissued. Case No: 74-7246 (Judge Wehle) |
| August 5, 1975 | City's Notice of Interlocutory Appeal to 4th DCA of Circuit Court Order of 7/8/75 denying City's Motion for Summary Judgment. |
| April 15, 1976 | 4th DCA Order Affirming Lower Court Denial of City's Motion for Summary Judgment in Yardarm v. City of Pompano |
| September 27, 1976 | Final Judgment *Yardarm v. City of Pompano Beach* granting mandatory relief (by Judge Wehle). Court finds that there was a showing of an obvious desire by the City to oppose the granting of the Building Permit to Plaintiff, and rules that February 14, |

1974 building regulations apply.

**3. 1977 – The Lawsuit Over the Parking Issue – Judge Wehle**

| | |
|---|---|
| February 14, 1977 | Yardarm Petition for Alternative Writ of Mandamus; Action for Further Declaratory and Other Relief (seeking issuance of permit under earlier parking regulations) Case No: 74-7246 (Judge Wehle) |
| March 14, 1977 | Order by Judge Wehle again reiterating that the "February 14, 1974 regulations apply." |

**4. 1978 – The Lawsuit Over Dock Permits – Judge Franza**

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|---|---|
| January 30, 1978 | Yardarm Petition for Supplemental Relief Pursuant to Chapter 86.061, F.S. (Regarding issuance of dock permit) Case No: 74-7426 (Judge Franza) |
| December 14, 1978 | Order directing issuance of dock permit and directing that City give Corps of Engineers assurances. Case No: 74-7426 (based on stipulation) |

**5. 1978-79 – Corps of Engineer Proceedings**

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|---|---|
| May 15, 1978 | City writes Corps of Engineers a letter. "The City of |

Pompano Beach hereby requests that the above referenced permit application be denied by the Corps of Engineers . . . we request that a public hearing be held."

**6. 1979-1981 – The Lawsuits Over Work Suspension – Judge Moriarty and Broward Board of Rules and Appeals**

| | |
|---|---|
| July 6, 1979 | Yardarm Petition for Supplemental Relief Pursuant to Chapter 86.061. F.S. seeking abatement of permit revocation process. Case No: 74-7426 (suit dismissed by Yardarm as moot; no hearings ever held) |
| July 10, 1979 | Permit nullified "Lapse Order". |
| August 7, 1979 | Yardarm appeals "Lapse Order" to Broward County Board of Rules and Appeals pursuant to 304.3(a) and 304.3(f), South Florida Building Code |
| September 13, 1979 | Broward County Board of Rules and Appeals votes to reinstate permit. (23 to 0; 2 abstaining) |
| September 18, 1979 | *City of Pompano Beach v. Yardarm* City's Petition for Certiorari to Circuit Court on ruling of Broward |

| | |
|---|---|
| | County Board of Rules and Appeals Upholding Yardarm's Appeal, Case No: 79-17186 (Judge Moriarty) |
| October 16, 1979 | Yardarm's Voluntary Notice of Withdrawal of Petition for Supplemental Relief, Case No: 74-7426 |
| December 21, 1979 | Order of Judge Moriarty upholding Broward County Board of Rules and Appeals |
| January 18, 1980 | Notice of Appeal by City to 4th DCA for Writ of Certiorari of December 21, 1979 Order of Judge Moriarty |
| July 1, 1981 | 4th DCA Order Denying City's Writ of Certiorari |

**7. 1985 – Suit to Enjoin Repeal of Special Exception – Judge Lee**

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|---|---|
| October 28, 1985 | *Yardarm v. City of Pompano Beach*, Petition for Injunction, Case No: 85-26568-CD (regarding repeal of Ordinance 73-96, Yardarm Special Exception Use) |
| October 28, 1985 | Order (to show cause) issued Case No: 85-26568-CD (Judge Lee) |
| November 20, 1985 | Order permanently enjoining City from repealing Ordinance 73-96, Case No: 85-26568-CD |

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|---|---|
| December 19, 1985 | City's Notice of Appeal to 4th DCA of November 20, 1985 Order of Judge Lee |
| July 15, 1987 | Fourth DCA "Reversed and remanded" Order permanently enjoining City from repealing Ordinance 73-96 Special Exception Use. *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 509 So.2d 1295 (Fla. 4th DCA 1987) |

**8. 1987-1998 – Suit for Damages, Case No: 87-19652 – Judge Ward, now Judge Moriarty**

| | |
|---|---|
| September 15, 1987 | *Yardarm v. City of Pompano*, Case No: 87-19652 Complaint for Damages |
| June 5, 1991 | Final Judgment finding liability for taking (Judge Ward) |
| September 9, 1994 | 4th DCA Opinion reversing as to taking but remanding for trial as to 42 U.S.C. §1983 due process. *City of Pompano Beach v. Yardarm Restaurant*, 641 So.2d 1377 (Fla. 4th DCA 1994) |

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## APPENDIX B

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: 87-19652 (23)

YARDARM RESTAURANT, INC.,

Plaintiff,

vs. FINAL JUDGMENT

CITY OF POMPANO BEACH,

Defendant.

_____/

This is one of a succession of cases the parties to this action have litigated since 1973. See Chronology, Appendix "A"

This particular case was commenced by the plaintiff, Yardarm Restaurant, Inc., a Florida Corporation (hereinafter referred to as "Yardarm") against the City of Pompano Beach (hereinafter referred to as "City") for inverse condemnation, an equitable action. The City has denied that there was a "taking" of Yardarm's property and has asserted affirmative defenses of *res judicata* and/or collateral estoppel; also, that the claim is time-barred because the statute of limitations has run.

*Factual Background*: The property on the east side of AlA, which lies directly next to the Hillsboro Inlet, was purchased in 1959 by the plaintiff corporation. There Yardarm built and ran a very successful restaurant for a number of years. In 1972, Yardarm decided to build an 18 story hotel on this property. In furtherance of this decision, the City's zoning laws, restrictions and regulations

were checked and it was determined that no height nor density requirements stood in the way of building an 18 story hotel. Yardarm's plans became well known at City Hall and were highly publicized in the news media. Almost immediately, opposition to the hotel began to mount.

At this point, it is important to identify the players and their testimony together with other events of 1972, 1973 and 1974.

1. *Jim Stephanis and Tom Stephanis* – Brothers who owned, 50% each, the Yardarm stock and ran the Yardarm restaurant. They also owned the Wharf restaurant in Lauderdale-By-The-Sea. Jim was active in the Democratic party and at one time ran for U.S. Congress. He later ran for the Chairmanship of the Broward County Democratic Party;

2. *Walter C. Williams* – Williams was the Chief Building Official of the City of Pompano Beach having held that position since 1969. His duties included supervision of field investigators and issuance of building permits upon building code compliance. He was in charge of the building department and reviewed plans to make sure they complied with the South Florida Building Code.

Williams' first contact with the Yardarm project was in December of 1972 when an associate of the architect assigned to build the hotel called him. Williams made preliminary inquiries concerning the project and determined that the Yardarm application for an 18 story hotel was proper. He issued the permit on February 14, 1974.

In the early morning of the 14th, a meeting was held between certain city officials and the Yardarm people. At this meeting, one participant, Fred Kleingartner, voiced

certain objections to the entire Yardarm plan. He held the unofficial title of "Planning Director." These objections were made by Kleingartner but they were at the instance of the Mayor and the City Manager. Despite these objections, Williams approved the permit later that day. At that time, there was neither a height limitation nor a density restriction for the construction of a hotel.

Four days later, February 18, 1974, Williams revoked the permit upon orders given to him by the City Manager. The revocation of the permit was done over Williams' objections and even though the plans had already received approval. When a second "review" of the plans was made, Williams, again, advised the City Manager and Kleingartner that the Yardarm project was in compliance. However, both men turned deaf ears on Williams' advice. When yet a third "review" was completed, it was again determined that the Yardarm project was in compliance, no permit was issued.

In early May of 1974, the City Manager forced Williams to sign a letter addressed to Yardarm's lawyer in which Williams stated that there were objections to the application. This letter was completely orchestrated by the City Manager and was not agreed to by Williams. Williams was forced to write a second letter which stated that the zoning for the Yardarm property would be changed. After receiving a reply from Yardarm, Williams was again forced to respond and state facts that he did not agree to.

3. *William J. Alsdorf* – Commissioner and Mayor of Pompano Beach. According to the Mayor, the Yardarm permit was granted on February 14, 1974 and revoked 4 days later. This revocation came as the result of the meeting between the City Manager, Fletcher Riley, Fred

Kleingartner and the Mayor. The Mayor stated that "Fletcher Riley had no business even attending the meeting because he was only a member of an advisory board." Riley was also a powerful member of the Hillsboro Shores Improvement Association, Inc., which had objected to the Yardarm project because the Association said the hotel would block the homeowners' view of the ocean. The Mayor pointed out that Riley was adamantly opposed to the project and the issuance of the permit. According to the Mayor's testimony, Kleingartner also asserted his negative views of the Yardarm. Mayor Alsdorf was quick to point out that as head of the Community Development Department, Kleingartner had no authority to participate in the decision-making-process. In other words, Kleingartner was acting illegally at the City Manager's behest.

The Mayor also stated that the administration, meaning the City Manager and Kleingartner, had not acted wisely nor had they played by the rules. However, with the upcoming election around the corner, the Mayor was also cognizant that a wrong decision could easily cost him the election. He specifically addressed his statements to a fellow commissioner, Max Ryder, and told him that he needed a good political lesson regarding his vote on the Yardarm. The Mayor was also concerned about the fact that the Republican Club was going to censor two commissioners for their vote in favor of the Yardarm. Incidentally, these two commissioners were defeated in the February 19, 1973 election. The Mayor also mentioned that certain Republican officials tried to intimidate the only black commissioner regarding this project.

4. *John G. Cartwright* – The testimony of Cartwright, the City Manager, established that he really had nothing to do with the issuance of building permits in his

capacity as City Manager but that he made a special exception for the Yardarm project. He stated that he instructed Walter Williams to revoke the building permit after he read "a big article in the paper" and conferred with Fred Kleingartner. Cartwright said that Williams was in disagreement with this position. Cartwright further testified that Kleingartner was serving illegally during this period of time.

He stated that Fletcher Riley had put pressure on him regarding the permit and asked him why it had ever been issued at all. Cartwright said that he had discussed the Yardarm with every commissioner during the election and that the Yardarm had become the major political issue. Not coincidentally, Commissioner Williams defeated Commissioner Ryder because of Ryder's position in favor of the Yardarm. He stated that the objections to the three subsequent "reviews" came from himself and the politicians and not from Williams.

5. *C. H. Fletcher Riley* – Riley held the title of Chairman of the Planning Board, with no "official" status. His Board had nothing to do with Yardarm's application. The Board's only official connection with the Yardarm project was to advise the Commission concerning the special exception use. In this capacity, the Board made a recommendation against the exception for the 18-story hotel.

Despite his lack of "official" status, Riley was very vocal about the permit revocation. According to his testimony, he arrived at City Hall at 8:00 a.m. on February 18, 1974, to confront the City Manager as to how the Yardarm permit could have ever been granted in the first place. He said that he conferred with Kleingartner between the time

the permit was issued on the 14th and when it was revoked four days later on the 18th. Riley had a very close relationship with Kleingartner and admitted that Kleingartner was working for the City in an illegal capacity.

Riley also stated that he offered advice which he knew was not his function. He stated that he contributed money to candidates who said they would keep the Yardarm hotel from being built. Those candidates were Ken Williams, William Alsdorf and Herbert Bard. When asked whether he was familiar with an attempt by the Republicans to censor two commissioners and intimidate a black commissioner for their support of the Yardarm, he was instructed by his lawyer, Russell Clark, not to answer the question.

6. *The Hillsboro Shores Improvement Association, Inc.* – A homeowners' group located on the south side of Hillsboro Inlet. They were led by Fletcher Riley, while wearing his "other hat." Riley was the prime mover behind the Association's decision to sue the City. The Association's main objections to the construction of the hotel were that it would block the view of the ocean and also block the light coming from the lighthouse at night.

7. *The Republican Club* – This organization threatened censorship of the commissioners who supported the Yardarm. It also tried to intimidate the lone black commissioner for his support of the Yardarm project.

With regard to the chronology of events that followed, while Yardarm was preparing to make re-application for the building permit, the City reduced the height limitation from 18 to 10 stories. Thereafter, Yardarm applied for and finally received the special exception use to construct an 18 story hotel in October of 1973. As previously mentioned, this special exception use was vigorously opposed

by Riley and the other members of the Hillsboro Association. After a 3-2 vote in favor of Yardarm, the Association filed suit to contest the city's action. Yardarm intervened in this lawsuit which resulted in a decision in favor of the City and Yardarm in sustaining the ordinance which created the special exception use. In early 1974, Yardarm reapplied for another permit. It was during this time that the City Manager, Cartwright, Kleingartner and Riley found technical flaws with the plans. While Williams was the only individual with authority to approve building permits, he was instructed not to approve the permit by the City Manager. This was done by sending a letter to Yardarm which he did not compose but was required to sign. After three such "reviews", Yardarm again resorted to court action and in 1977, the permit was issued after 2 1/2 years of litigation in the circuit and appellate courts.

At this point, the City commenced to harass the Yardarm people regarding the work in progress, disputes over dock permits and other matters. Yardarm was forced to go back to court to get dock permits. This was in late 1978.

In 1979, the permit was again revoked and Yardram [sic] did not receive it back until July of 1981 after another two years of litigation. Thus, for the first eight years after the permit was originally issued, Yardarm was forced to defend the granting of the permit and special exception use 8 different times either in the lower court or in the appellate court. All of these decisions resulted in wins for Yardarm. By this time, it is quite obvious that the City and its officials had become very litigious and hostile toward the Yardarm.

While all of the before-mentioned litigation was pending, Yardarm tried to obtain financing for the construction of the buildings, first, on the east side of AlA and then on the west side for the property it had purchased there in 1981. No less than 48 attempts were made at obtaining financing. All attempts for permanent financing failed, although certain other smaller loans were obtained. Several reasons were given for Yardarm's failure to obtain permanent financing: 1. The lenders were looking for a bigger project; 2. The cost per room was prohibitive; 3. The configuration of the properties wasn't right, etc. However, by far the biggest and overriding reason given was the City's hostility toward the project. No lending institution wanted to get involved in a community where there had been so much wrangling and bitter opposition to the project. Because of this acrimonious atmosphere and the adverse publicity, Yardarm's credibility in the financial community was nil.

In May of 1985, the City advised Yardarm that its permit had lapsed because as the City phrased it, "Yardarm had done minimal work to keep the permit alive." In October of 1985, Yardarm applied for another permit for the construction of the buildings on both sides of AlA. At this time, the City had pending a proposed ordinance to revoke the special use exception which had been granted to Yardarm 12 years earlier. Once again, Yardarm went to court and obtained an injunction against the City preventing it from repealing the special use exception. This decision was appealed by the City and in July of 1987, the Appeals Court reversed the lower court and ruled that the principles of equitable estoppel did not apply and that the City was within its right to pass the ordinance in question as it was an administrative function of the City.

It should be noted that in May of 1985, Sunrise Savings and Loan Association sued the Yardarm to foreclose the mortgage. On February 20, 1986 Sunrise obtained a judgment of foreclosure with a sale date of March 21, 1986. On the eve of the foreclosure sale, Yardarm filed for protection under chapter 11 in the Bankruptcy court and obtained a stay of the foreclosure proceedings. Thereafter, the stay was lifted and the Federal Savings and Loan Insurance Corporation (FSLIC), as receiver for Sunrise, purchased the property and then sold it to the City (irony of all ironies). This suit followed in 1987.

ISSUES:

1. Whether there was a taking of the property in question;

2. Whether the doctrine of *res judicata* and/or collateral estoppel are available as defenses;

3. Whether the statute of limitations has run on the plaintiff's claim.

THE CASE LAW:

1. *Penn Central Transportation Co.* vs. *City of New York*, 98 Sup. Ct. 2646

As pointed out in this case at page 2659, the question of "what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. Quite simply, the trial court has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government. Each case rises

or falls largely "upon the particular circumstances in that case." As identified in the cases, several factors have been taken into consideration:

a. the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations;

b. The "character" of the governmental action;

c. Where the governmental tribunal reasonably concluded that the "health, safety, morals and general welfare "would be promoted by prohibiting particular contemplated uses of land. See numerous cited cases.

Further, this case cites the case of *Goldblatt* v. *Hempstead*, 82 S. Ct. at page 990 for the proposition that it is implicit that a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose.

Finally, the case quotes Mr. Justice Holmes, who, speaking for the court, warned that the courts were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Citing *Pennsylvania Coal Co.* vs. *Mahon*, 43 Sup. Ct. @ 160.

2. In *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles, California*, 107 S. Ct 2378 (1987), in which the City has heavily relied upon, the Supreme Court came to grips with the problem of remedies for a regulatory taking. The California Court of Appeals had rejected a landowner's claim for damages due to a land use regulation prohibiting any building in a flood prone area. the Court of Appeal's reasoning was based on

the California Supreme court's holding that inverse condemnation is not available to an owner suffering loss because of a zoning regulation. The only available remedies for affected Californians were mandamus or declaratory relief. If a zoning regulation is declared invalid, said the California courts, then, if the government persisted in applying the voided regulation, damages might be recoverable.

The *First English Evangelical* decision expressly examined the question of whether a state may constitutionally limit the remedy for a taking to non-monetary relief. After a detailed discussion of the theory and precedent the Supreme court held that:

" . . . where the government's activities have already worked a taking of *all* use of property, no subsequent action by the government (i.e., amendment or elimination of the ordinance) can relieve it of the duty to provide compensation for the period during which the taking was effective. . . . Invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy. . . . "

3. *City of Clearwater* v. *College Properies* [sic], *Inc.*, 239 So2 515

In this case, the city of Clearwater had denied applicant's request for change of zoning. The circuit court quashed the action taken by the City and enjoined it from enforcing its zoning regulations as applied to the applicant's property and ordered the City to change the zoning of applicant's property to a less restrictive classification. The City appealed.

In this case, the City Planner stated that the zoning in place was better for "sanitary" and "aesthetic" reasons and that it would give "stability" to the neighborhood; also, that it would prevent an increase flow of traffic in the neighborhood.

The trial court found that the evidence clearly established that the zoning regulation in question as applied to applicant's property was unlawful, unreasonable and capricious; that the restrictions imposed on the property bore no relationship to the public health, safety, morals or welfare of the citizens and that the action of the City was contrary to law and amounted to confiscation of applicant's property.

In affirming the trial court, the appeals court stated that a reduction in the value of the property caused by the zoning ordinance is not, of itself, enough to render the ordinance confiscatory. The property owners must show that the application of the zoning ordinance has the effect of completely depriving them of the beneficial use of their property by precluding all uses *or the only use to which it is reasonably adopted, or that the ordinance has invaded their personal or property right unnecessarily or unreasonably in violation of the Federal or Florida Constitution.* (Court's Emphasis)

4. *Askew* vs. *Gables-By-The Sea, Inc*, 333 So2 56

In January of 1936, plaintiff acquired by purchase, from the Trustees of the Internal Improvement Fund, a substantial tract of bay bottoms in Biscayne Bay and the City of Coral Gables. The bulkhead line had extended seaward and was reestablished some distance seaward from its previous location. In 1956, the plaintiff began to seek the necessary permits to dredge from the adjacent

public bottoms and fill its land. The Trustees agreed to issue the permit in May of 1956. In 1967, plaintiff purchased and paid for the second parcel of bottoms – that lying between the old and new bulkhead lines. Prior to October, 1965, the City of Coral Gables approved a fill permit which was extended to 1968. The Trustees also approved it. In May of 1968 the Trustees, by resolution, prohibited any person from dredging unless said operations had already commenced. When this permit denial was lifted, the U.S. Corps of Engineers, which previously had permitted the project, ruled that the permit had expired and would not be revived or extended. The court ruled that these actions were without lawful authority and void and that plaintiff had the lawful right to dredge material from the areas on the permit. The case was appealed. The appeals court in affirming the inverse condemnation judgment held:

"It is the conclusion of this court that the appeal herein is dilatory in nature, is sought by appellants for the sole purpose of further frustrating and delaying compliance with the mandate of this court and the final judgment of the trial court, is frivolous, and not taken in good faith."

In this case, it took the landowner 13 years of bureaucratic delays and protracted litigation to get its permit.

In finding for the owner, the court concluded that not only had the owner's permit been unlawfully revoked but that the revocation ultimately resulted in the denial to the plaintiff the use of his land for private purposes (after 13 years of litigation). Further, the court concluded that the unlawful action of the Defendants caused the valid permit to expire; that the Defendants had used every court process to delay the granting of the permit which ultimately caused

the Plaintiff to be denied the use of his property. The Defendants were enjoined and the plaintiff was found to be entitled to a judgment requiring the Defendants to institute condemnation proceedings.

5. *The Hollywood Beach Hotel Co.* vs. *The City of Hollywood*, 329 So2 10

The plaintiffs owned 105 acres in the City of Hollywood which were zoned for a golf course. In 1968 the owners decided to develop the property into a 6000 unit complete community and petitioned the City for a change of zoning. This change was adopted by the City upon passage of an ordinance to that effect. In early December of 1969, two commissioners who voted for the ordinance were defeated for re-election. On December 17, 1969, the two new commissioners joined with the commissioner who had originally opposed the ordinance to petition the planning and zoning for a reevaluation of the project. On December 30, 1969, the owners obtained a building permit from the State for the construction of the first five million dollar building. On January 12, 1970, the planning and zoning board tabled the City's motion for reevaluation. Also, on January 12, 1970, the building permit for the project was issued by the City. On February 19, 1970, the City brought a petition to rezone the property before the planning and zoning board. On February 21, after nine or ten months of preparation and an expenditure of $191,000, the owners sued the City for injunctive relief. The court denied the temporary relief and denied the City's motion to dismiss. The City filed an interlocutory appeal on March 19th. In the meantime the planning and zoning board denied the City's petition to rezone. The City appealed the planning and zoning board's decision which was tabled for 60 days on July 15th and the City extended the

building permit. On August 21, the Court of Appeals affirmed the trial Court's denial of the motion to dismiss. The City then voted to petition for rehearing and, if denied, to appeal to the Supreme court. After rehearings and petition for certiorari were denied in January, 1971, the City filed its answer on February 1971. The City then rescinded the extension of the permit and demanded that the owners exercise their rights under the permit within 90 days. On March 17, the petitioners requested the return of their permit fee until building conditions improved. This request was denied. In the meantime, the suit for injunctive relief was actively prosecuted. In December 1971, the remaining two commissioners who had voted for the change of the ordinance were defeated. In January, 1972, the Commission asked the planning and zoning board to, again, reevaluate the project. Also, the Commission took the first action to lower the density on the property. This requirement had the effect of rendering the property site plan useless. Owners then sought another temporary injunction. On February 14, the planning and zoning board approved a rezoning plan. At the hearing for injunctive relief, the petitioner pointed out that the delays together with the newspaper coverage had prevented them from getting financing and that the project had been kept in limbo because of the City's actions: that the site plan had been rendered useless as was the building permit.

On March 1, 1972 the density ordinance passed and on April 17, the planning and zoning board recommended that the property be rezoned. On June 28, the commission rezoned the property. On July 19, the trial court entered a permanent injunction against the City enjoining the passage of the ordinance. The District Court reversed and the Florida

Supreme Court granted certiorari. The Supreme court found that the Appeals Court had substituted its' judgment for that of the trial court and had reevaluated the evidence. It also found that the owners had taken steps which equitably estopped the City and that the owners' building permit was not forfeited. The Court noted that, *"it is undeniable that the only circumstance which necessitated the ultimate rezoning was the adverse political climate which wrought defeat of every commissioner who had voted for the rezoning; also, that the City sought to accomplish by delay that which it could not accomplish by immediate rezoning.* (Court's emphasis)

Other cases have been cited by respective counsel and will be referred to in the holding of this case.

Findings:

The court finds that there was a "taking" by inverse condemnation of plaintiff's property by the defendant City; that the doctrines of *res judicata* and/or collateral estoppel are not available as defenses by the City; that the statute of limitations did not run as the city claims.

As to the taking, Yardarm's cause is pregnant with equity. The only embryo the court can countenance (by the City) was the action taken by Walter Williams, the Chief Building official; however, the city's obstructionist and illegal acts aborted Williams' professed policy toward Yardarm long ago. The course of action chosen by the City initially and throughout the years that the parties have been engaged in litigation, must be described not only as arbitrary but also must be equated with "unfair dealing." Every citizen (which includes Yardarm) has the right to expect that he will be dealt with fairly by his government. Unfair dealing by a

municipality carries with it the attendant responsibility for the adverse effect it knows or should know its deliberate inaction will have upon the parties with whom it is dealing. See *Hollywood Beach Hotel case*.

The first factor taken into consideration by the landmark case of *Penn Central Transportation Co.* is the economic impact the governmental action has upon the claimant. In this case, yardarm and its stock holders ultimately filed for bankruptcy primarily because of the City's action. Probably the two most important factors cited in the *Pen Central* case are the "character" of the governmental action and whether the governmental tribunal reasonably concluded that the "health, safety, morals and general welfare" would be promoted prohibited particular uses of land. As to the "character" of the action taken here, simply stated, it was purely political. The Hillsboro Association, through Fletcher Riley, jumped on the Yardarm issue knowing that the Mayor and the other Commissioners would march to their tune because of the upcoming election. Further, at no time can it be said that the regulatory actions taken by the City promoted safety, morals, health and the general welfare of the City. The only thing promoted by the politicians was the protection of the property owners (Hillsboro Association) from having their view of the ocean and light at the lighthouse obstructed by the construction of the hotel. This distinction is important because City's counsel have relied on the *First English Evangelical Church* case for the proposition that the landowner must prove that he was denied *all* use of his property. In the Court's view *First English Evangelical Church* is distinguishable because the ordinance in that case prevented the construction of buildings in a flood prone area which certainly promoted the general welfare

and safety of the community. In this case, it is undeniable that the only circumstance which necessitated the regulatory action was the adverse political climate which wrought defeat on those commissioners who voted in favor of constructing the hotel.

Similarly, in the *City of Clearwater* case, the court held that the passage of the ordinance for "sanitary", "aesthetic", and "stability" of the neighborhood were not enough for the general welfare of the community. In holding for the property owner, the Court went on to state that if the regulatory action has invaded personal or property rights unnecessarily or unreasonably, in violation of the Florida and Federal Constitutions, then it must be equated with arbitrary and capricious action. In our view, the latter principle applies here; therefore, the property owner is not required to prove denial of *all* use of its property. To add emphasis to the proposition that it is implicit that the regulatory action be taken for a valid public purpose, just the reverse was true in this case. In fact, two of the City officials, Kleingartner and Riley clearly usurped their authority as they committed illegal acts; the city Manager got involved when it was not his duty to do so; the Mayor was concerned about getting re-elected as were the other commissioners. Finally, under no circumstances can it be said that the public's health, safety and welfare were promoted by protecting the homeowners' view of the ocean and the light from the lighthouse.

While it is not necessary to prove denial of *all* use (for the reasons stated), Yardarm, in fact, was denied all use of its property. Time and time again civil actions had to be brought; they were always appealed by the City. In the court's estimation these appeals were both dilatory and frivolous. They fostered nothing but to frustrate Yardarm's

purpose. Illegal acts of certain City officials caused a lawful permit to be revoked which led to a series of events which ultimately led to the loss of Yardarm's property. In this hostile atmosphere, even if Yardarm had wanted to use the property for another purpose, the City would not have allowed it.

Counsel for the City have cited the case of *McNulty* vs. *Town of Indiatlantic*, 727 F. Supp. 604, in support of their position that the property owner was not denied *all* use of his property. As in the *First English* case, a *valid* ordinance was in place for the protection of sand dunes. For this reason, *McNulty* can be distinguished from the facts of this case.

City's counsel claim that Yardarm's case is time-barred. This case is not unlike *Askew* vs. *Gables-By-The-Sea, Inc.*. In that case, it took the landowner 13 frustrating years to finally obtain its permit. There, the illegal revocation of the permit finally caused the loss of the property. If the statute of limitations is applicable in this case (and the court isn't sure that it is) then it was tolled for the same reasons that it was tolled in *Askew*. The dilatory and bad faith actions of the City were continuous in nature and, indeed, had a domino effect which ultimately caused the loss of the property.

The City has also raised the defenses of *res judicata* and/or collateral estoppel. It cites *City of Pompano Beach* vs. *Yardarm Restaurant, Inc.*, 509 So2 1295 as its authority. In that case certain statements were made by the court to the effect that the City's "obstructionist tactics" had ended in 1979. In that case, the court did not have a complete and up-to-date record. Further, the statement was *dicta* and did not pertain to the holding of the case. The Court noted that the City had never been given an opportunity to determine whether the ordinance in question served

the public's interest and for that reason should not be enjoined; that, also, Yardarm had not shown sufficient basis for "irreparable injury" grounded in principles of estoppel and equitable estoppel to sustain a request for permanent injunction. Since the causes of action and issues of that case are entirely different from the cause of action for inverse condemnation in this case, the principles of *res judicata* and/or equitable estoppel do not apply.

For the reasons stated, the Court finds that there was a taking of plaintiff's property (the fee) as described in the attached Appendix "B"; that the effective date of the taking was October 30, 1985; that the city of Pompano Beach is responsible for the taking and is liable for payment of full compensation under the constitutions of the United States and Florida and Florida's eminent domain law, F.S. 73 and 74; that a jury shall be impaneled to make its findings relative to the issue of valuation; that the City of Pompano Beach shall be responsible for payment of reasonalbe [sic] costs and attorneys fees for the entire proceeding; that the hearing regarding reasonable attorneys fees and costs shall be heard after the conclusion of the valuation trial.

DONE AND ORDERED this 5th day of June, 1991

/s/ C. Lavon Ward
C. LAVON WARD,
Circuit Judge

Copies furnished:
Randy Adams, Esq.
Earl Faircloth, Esq.
Henry Latimer, Esq.
Marcy S. Resnik, Esq.

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY FLORIDA

CASE NO: 87-19652(18)

YARDARM RESTAURANT, INC.,

Plaintiff,

vs.

CITY OF POMPANO BEACH,

Defendant. /

**FINAL JUDGMENT**

Pursuant to the verdict rendered in this action

IT IS ADJUDGED:

1. That Plaintiff, YARDARM RESTAURANT, INC., recover from the Defendant CITY OF POMPANO BEACH, the sum of $7,601,920 and in addition, the Plaintiff shall recover prejudgment interest of $11,601,571.

2. The Court reserves jurisdiction to award the Plaintiff [and or defendant /s/ tr] taxable costs and attorney fees.

ORDERED at Fort Lauderdale, Broward County, Florida, this 13th day of January, 2000.

/s/ W. Herbert Moriarty
Circuit Judge

Copies furnished:

Randolph W. Adams, Esq.

Margaret L. Cooper, Esq.

Henry Latimer, Esq.

[SEAL]

STATE OF FLORIDA
BROWARD COUNTY
I DO HEREBY CERTIFY the within and foregoing is true and correct copy of the original as appears on record and file in the office of the Circuit Court Clerk of Broward County Florida.

WITNESS my hand [illegible] Florida, this the ___ day of ___ A.D. ___.

Robert E. Lockwood,
Clerk

/s/ [Illegible]
Deputy Clerk

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY FLORIDA

CASE NO: 87-19652(18)

YARDARM RESTAURANT, INC.,

Plaintiff,

vs.

CITY OF POMPANO BEACH,

Defendant. /

**ORDER**

THIS CAUSE having come on to be heard on Plaintiff's Motion for Reinstatement and the Court, having heard argument of counsel and being otherwise advised in the premises, it is hereupon

ORDERED AND ADJUDGED that said Motion be, and the same is hereby GRANTED. Count I of the Complaint filed September 15, 1987 is Reinstated as to Plaintiff's claims under the Fifth and Fourteenth Amendments of the Constitution of the United States, and Count II of the Complaint filed September 15, 1987 is Reinstated as to Plaintiff's claims under Title 42 of the United States Code, Section 1983.

Defendant has twenty (20) days to respond.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 15 day of August, 1996.

/s/ W. Herbert Moriarty
Circuit Judge

Copies furnished:
RANDOLPH W. ADAMS, ESQ.
HENRY LATIMER, ESQ.

A TRUE COPY

**Supreme Court of Florida**
WEDNESDAY, JULY 16, 2003

**CASE NO.:** SC03-409
Lower Tribunal Nos.: 4D99-977, 4D00-591, 4D00-2499

| | | |
|---|---|---|
| YARDARM RESTAURANT, INC. | vs. | CITY OF POMPANO BEACH |
| Petitioner(s) | | Respondent(s) |

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the court. *See* Fla. R. App. P. 9.330(d).

PARIENTE, QUINCE, CANTERO and BELL, JJ., concur.
LEWIS, J., dissents.

Petitioner's and Respondent's Motions for Attorney's Fees are hereby denied.

A True Copy
Test:
/s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

[SEAL]

bh
Served:

RANDOLPH W. RANDOLPH ADAMS
MARGARET LESLIE COOPER
JANE KREUSLER-WALSH
HON. HOWARD FORMAN, CLERK

HON. W. HERBERT MORIARTY, JUDGE
HON. MARILYN BEUTTENMULLER, CLERK
JEROLD I. BUDNEY
CARAN ROTHCHILD
HENRY LATIMER

SUPREME COURT, U.S.
FILED
DEC 8 - 2003
OFFICE OF THE CLERK

No. 03-531

IN THE

# Supreme Court of the United States

YARDARM RESTAURANT, INC.,

*Petitioner*,

*v.*

THE CITY OF POMPANO BEACH,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT**

## BRIEF IN OPPOSITION

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## TABLE OF CONTENTS

*Page*

Table of Cited Authorities ..... iii

Opinions Below ..... 1

Statement of the Case ..... 2

Reasons for Denying the Petition ..... 4

I. *Yardarm II* Does Not Conflict With Federal Takings Law Because, *Inter Alia*, The Fourth District's Decision That Petitioner's Takings Claim Was Barred As *Res Judicata* Was Based On Florida Law. ..... 5

II. There Is No Decisional Conflict Between *Yardarm II* And Any Applicable Federal Case Cited By Petitioner Regarding Whether Petitioner's State Created Rights Were Entitled To Substantive Due Process Protection. ..... 11

III. There Is No Decisional Conflict Between *Yardarm II* And Any Substantive Due Process Case Cited By Petitioner Analyzing The Executive vs. Legislative Distinction. *Yardarm II* Properly Held That Petitioner Has No Substantive Due Process Claim With Respect To Its Building Permits Because, *Inter Alia*, The Acts Complained Of Were "Executive" Not "Legislative." ..... 20

*Contents*

*Page*

IV. There Is No Decisional Conflict Regarding Procedural Due Process Presented By *Yardarm II*. . . . . 23

V. The Petition Presents No Intolerable Conflict Among The Nation's Lower Courts, No Confusion Or Error So Important That It Must Be Corrected Immediately, And No Need For The Court To Expand The Substantive Component Of Due Process. . . . . 26

Conclusion . . . . . 29

## TABLE OF CITED AUTHORITIES

**CASES** *Page*

*Adams v. Robertson,*
520 U.S. 83 (1997) ..... 10

*Agins v. City of Tiburon,*
447 U.S. 255 (1980) ..... 5, 6, 8, 11

*Albery v. Reddig,*
718 F.2d 245 (7th Cir. 1983) ..... 27

*Albright v. Oliver,*
510 U.S. 266 (1994) ..... 13

*Bankers Life and Casualty Co. v. Crenshaw,*
486 U.S. 71 (1988) ..... 10

*Biser v. Town of Bel Air,*
991 F.2d 100 (4th Cir. 1993) ..... 15

*Board of Regents v. Roth,*
408 U.S. 564 (1972) ..... 14, 17-18

*Boatman v. Town of Oakland,*
76 F.3d 341 (11th Cir. 1996) ..... 24

*Bohen v. City of East Chicago,*
799 F.2d 1180 (7th Cir. 1986) ..... 22

*Cited Authorities*

*Page*

*Boston Envtl. Sanitation Inspectors Ass[']n v. City of Boston,*
794 F.2d 12 (1st Cir. 1986) ..... 17

*Bowers v. Hardwick,*
478 U.S. 186 (1986) ..... 17

*Brown v. Brienen,*
722 F.2d 360 (7th Cir. 1983) ..... 14

*Bryan v. City of Madison,*
213 F.3d 267 (5th Cir. 2000) ..... 19

*Burrell v. City of Kankakee,*
815 F.2d 1127 (7th Cir. 1987) ..... 15

*Carolan v. City of Kansas City, Mo,*
813 F.2d 178 (8th Cir. 1987) ..... 15

*Charles v. Baesler,*
910 F.2d 1349 (6th Cir. 1990) ..... 17

*Chesterfield Dev. Corp. v. City of Chesterfield,*
936 F.2d 1102 (8th Cir. 1992) ..... 19

*Chiplin Enterprises, Inc. v. City of Lebanon,*
712 F.2d 1524 (1st Cir. 1983) ..... 15

*Cited Authorities*

*Page*

*Chongris v. Board of Appeals of Town of Andover,* 811 F.2d 36 (1st Cir. 1987) *cert. denied,* 483 U.S. 1021 (1987) ..... 27

*Chudasama v. Mazda Motor Corp.,* 123 F.3d 1353 (11th Cir. 1997) ..... 4

*City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation,* 538 U.S. 188, 123 S. Ct. 1389 (2003) ..... 13

*City of Pompano Beach v. Yardarm Restaurant, Inc.,* 834 So.2d 861 (Fla. Dist. Ct. App. 2002) ..... *passim*

*City of Pompano Beach v. Yardarm Restaurant, Inc.,* 641 So.2d 1377 (Fla. Dist. Ct. App. 1994) .... *passim*

*City of St. Louis v. Praprotnik,* 485 U.S. 112 (1988) ..... 22

*Coleman v. Thompson,* 501 U.S. 722 (1991) ..... 9

*Collins & Co., Inc. v. City of Jacksonville,* 38 F. Supp. 2d 1338 (M.D. Fla. 1998) ..... 21

*Cited Authorities*

*Page*

*Colony Square So. v. Prudential Ins. Co.*,
819 F.2d 272 (11th Cir. 1987), *cert. denied*,
485 U.S. 977 (1988) ..... 3-4

*Construction Ind. Ass'n Sonoma Cty. v. City of Petaluma*,
522 F.2d 897 (9th Cir. 1975), *cert. denied*,
424 U.S. 934 (1976) ..... 27

*Creative Environments, Inc. v. Estabrook*,
680 F.2d 822 (1st Cir.), *cert. denied*, 459 U.S. 989
(1982) ..... 15, 26-27

*Crocker v. Hakes*,
616 F.2d 237 (5th Cir. 1980) ..... 25, 28

*Crown Point I, LLC v. Intermountain Rural Elec. Assn.*,
319 F.3d 1211 (10th Cir. 2003) ..... 19

*Crymes v. Dekalb County, Georgia*,
923 F.2d 1482 (11th Cir. 1991) ..... 21

*Daugherty v. Sarasota County*,
157 F.R.D. 542 (M.D. Fla. 1994) ..... 8

*DeCarlo v. Fry*,
141 F.2d 56 (2d Cir. 1998) ..... 22

*Durley v. Mayo*,
351 U.S. 277 (1956) ..... 10

*Cited Authorities*


| | Page |
|---|---|
| *FMC Corp. v. Varco Int'l, Inc.*, 677 F.2d 500 (5th Cir. 1982) | 4 |
| *Gamble v. Eau Claire County*, 5 F.3d 285 (7th Cir. 1993), *cert. denied*, 510 U.S. 1129 (1994) | 8 |
| *Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992) | 15, 26 |
| *Griswold v. Connecticut*, 381 U.S. 479 (1965) | 14 |
| *Harbours Pointe of Nashotah v. Village of Nashotah*, 278 F.3d 701 (7th Cir. 2002) | 9 |
| *Harman v. Forssenius*, 380 U.S. 528 (1945) | 22 |
| *Hicks v. Feiock*, 485 U.S. 624 (1988) | 10 |
| *Hughes v. Washington*, 389 U.S. 290 (1967) | 22 |
| *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) | 10 |
| *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986) | 19 |

*Cited Authorities*

*Page*

*Lynch v. People of New York,*
293 U.S. 52 (1934) ..... 9

*McKinney v. Pate,*
20 F.3d 1550 (11th Cir. 1994), *cert. denied,*
513 U.S. 1110 (1995) ..... 11, 17, 21, 22

*Michigan v. Long,*
463 U.S. 1032 (1983) ..... 7

*Midnight Sessions, Ltd. v. Philadelphia,*
945 F.2d 667 (3d Cir. 1991) ..... 25

*Migra v. Warren City School Dist. Board of Educ.,*
465 U.S. 75 (1984) ..... 7

*Monell v. Department of Social Services of the City of New York,*
436 U.S. 658 (1978) ..... 22

*Moore v. East Cleveland,*
431 U.S. 494 (1977) ..... 14, 17

*Natale v. Town of Ridgefield,*
170 F.3d 258 (2d Cir. 1999) ..... 18

*Nicholas v. Pennsylvania State Univ.,*
227 F.3d 133 (3d Cir. 2000) ..... *passim*

*Cited Authorities*

*Page*

*North Florida Educ. Dev. Corp. v. Woodham*,
942 F. Supp. 542 (N.D. Fla. 1996), *appeal at*
138 F.3d 955 (11th Cir. 1998) ..... 21

*Oklahoma City v. Tuttle*,
471 U.S. 808 (1985) ..... 22

*Pace Resources, Inc. v. Shrewsbury Township*,
808 F.2d 1023 (3d Cir.), *cert. denied*, 482 U.S.
906 (1987) ..... 15

*Palazzolo v. Rhode Island*,
533 U.S. 606 (2001) ..... 6

*Palko v. Connecticut*,
302 U.S. 319 (1937) ..... 16, 17

*Pascoag Reservoir & Dam, LLC v. Rhode Island*,
337 F.3d 87 (1st Cir. 2003) ..... 8-9

*PFZ Properties, Inc. v. Rodriguez*,
928 F.2d 28 (1st Cir. 1991) ..... 15, 28

*Poe v. Ullman*,
367 U.S. 497 (1961) ..... 14

*Raskiewicz v. Town of Boston*,
754 F.2d 38 (1st Cir. 1985), *cert. denied*, 474 U.S.
845 (1985) ..... 27

*Cited Authorities*

*Page*

*Regents of Univ. of Mich. v. Ewing,*
474 U.S. 214 (1985) ..... 13, 14, 16

*Reserve Ltd. v. Town of Longboat Key,*
933 F. Supp. 1040 (M.D. Fla. 1996) ..... 16

*Rhyce v. Martin,*
173 F. Supp. 2d 521 (E.D. La. 2001) ..... 17

*Roberts v. Moss,*
344 F.2d 747 (3d Cir. 1965) ..... 4

*Roe v. Wade,*
410 U.S. 113 (1973) ..... 14

*Sauer v. New York,*
206 U.S. 536 (1907) ..... 18

*Schaper v. City of Huntsville,*
813 F.2d 709 (5th Cir. 1987) ..... 17

*Scott v. Greenville County,*
716 F.2d 1409 (4th Cir. 1983) ..... 22

*Scudder v. Town of Greendale,*
704 F.2d 999 (7th Cir. 1983) ..... 15

*South Gwinnett Venture v. Pruitt,*
491 F.2d 5 (5th Cir.), *cert. denied,* 419 U.S. 837
(1974) ..... 15

*Cited Authorities*

*Page*

*Sutton v. Cleveland Bd. of Educ.*,
958 F.2d 1339 (6th Cir. 1992) ..... 17

*Sylvia Dev. Corp.*,
48 F.3d 810 (4th Cir. 1995) ..... 15

*Tri-County Paving, Inc. v. Ashe County*,
281 F.3d 430 (4th Cir. 2002) ..... 18

*TRM, Inc. v. United States*,
52 F.3d 941 (11th Cir. 1995) ..... 20

*United Artists Threatre Circuit, Inc. v. Township of Warrington, PA*,
316 F.3d 392 (3rd Cir. 2003) ..... 25

*United States ex rel. T.V.A. v. Powelson*,
319 U.S. 266 (1943) ..... 18

*United States v. El Paso Natural Gas Co.*,
376 U.S. 651 (1964) ..... 4

*Vandor, Inc. v. Militello*,
301 F.3d 37 (2d Cir. 2002) ..... 9

*Village of Belle Terre v. Boraas*,
416 U.S. 1 (1974) ..... 27

*Washington v. Glucksberg*,
521 U.S. 702 (1997) ..... 12, 13

*Page*

*Weinberg v. Whatcom County,*
241 F.3d 746 (9th Cir. 2001) ..... 19

*Williams v. Goldsmith,*
905 F. Supp. 996 (M.D. Ala. 1995) ..... 21

*Wohl v. City of Hollywood,*
915 F. Supp. 339 (S.D. Fla. 1995) ..... 21

*Yale Auto Parts, Inc. v. Johnson,*
758 F.2d 54 (2d Cir. 1985) ..... 26

*Yardarm Restaurant, Inc. v.*
*City of Pompano Beach,*
515 U.S. 1144 (1995) ..... 1, 3

*Yardarm Restaurant, Inc. v.*
*City of Pompano Beach,*
651 So.2d 1197 (Fla. 1995) ..... 1, 3

**U.S. CONSTITUTIONS**

U.S. Const. amend. V ..... 2

U.S. Const. amend. XIV ..... 2

**STATUTE**

42 U.S.C. § 1983 ..... 2, 5, 20, 22, 24

The Respondent, the City of Pompano Beach (the "City"), respectfully requests this Court to deny the Petition for Writ of *Certiorari*. The Fourth District Court of Appeal's decision did not create any conflict, let alone an intolerable conflict among the nation's lower courts. Nor did the Fourth District Court of Appeal commit any error so important that it must be corrected immediately.

## OPINIONS BELOW

The opinion of the Fourth District Court of Appeal ("Fourth District"), entered on October 9, 2002 and attached as Appendix 1 through 19 to the Petition, is reported as *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 834 So. 2d 861 (Fla. Dist. Ct. App. 2002) ("*Yardarm II*"). Petitioner's Motion for Rehearing, Rehearing *En Banc*, and to Certify Questions of Great Public Importance were denied on February 4, 2003 by Order of the Fourth District, which is attached as Appendix 20 through 21 to the Petition. Petitioner's Petition for Discretionary Review of *Yardarm II* by the Supreme Court of Florida was denied on July 16, 2003, which order is attached as Appendix 120 through 121 to the Petition.

An earlier opinion of the Fourth District in favor of the City entered on September 9, 1994 and attached as Appendix 22 through 47 to the Petition, is reported as *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So. 2d 1377 (Fla. Dist. Ct. App. 1994) ("*Yardarm I*"). Petitioner's Petition for Discretionary Review of *Yardarm I* by the Supreme Court of Florida was denied. *Yardarm Restaurant, Inc. v. City of Pompano Beach*, 651 So. 2d 1197 (Fla. 1995). This Court also denied Petitioner's Petition for Writ of *Certiorari* of *Yardarm I*. *See Yardarm Restaurant, Inc. v. City of Pompano Beach*, 515 U.S. 1144 (1995).

## STATEMENT OF THE CASE[1]

In 1987, Petitioner filed a two count Complaint alleging that the City had taken its property, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Florida Constitution, and 42 U.S.C. § 1983. (App. at p. 31). Both counts alleged that, starting in 1973, the City took Petitioner's property by engaging in obstructionist tactics of Petitioner's proposed hotel projects with respect to issuance and revocation of building permits. (App. at p. 31).

In 1990, the trial court granted partial summary judgment in favor of the City on Yardarm's federal takings claims, agreeing that Yardarm could not pursue its federal takings claims until it had exhausted its state law takings claim. (App. at p. 31 n.6).

Trial on Petitioner's state law takings claim occurred in 1991 (the "1991 Trial"). (App. at p. 31). The City defended Petitioner's claims by introducing evidence that Petitioner had a building permit in place from 1977 to 1979, and from July, 1981 to May, 1985, Petitioner's inability to obtain financing

---

1. In accordance with its obligation to the Court to point out any perceived misstatement made in the Petition, SUP. CT. R. 15(2), the City hereby disputes Petitioner's purported "facts" in its "Jurisdiction" and "Statement of the Case" sections, and throughout the Petition, because such "facts" are not borne out by the Record below or the Fourth District's decisions. (App. at pp. 1-19, and 22-47). In addition to presenting "facts" that are unsupported by, and in most instances directly contrary to, the Record, Petitioner erroneously represents that the factual "findings [of the trial court] were not reversed by the [Fourth District,]" (Pet. at p. 3 n.2), when in actuality both judgments (App. at pp. 48-95, and 96-115) were reversed in their entirety. (App. at pp. 1-19, and 22-47). In both *Yardarm I* and *Yardarm II*, the Fourth District, in reversing the trial court, provided the operative facts. (App. at pp. 1-19, and 22-47). ***The facts of this case, as stated by the Fourth District in Yardarm I and Yardarm II, do not present the issues or questions raised by Petitioner in its Petition.***

was due to causes unrelated to the City's earlier alleged actions (in 1973-74), and Petitioner ultimately lost its property in 1986 not because of the City, but because it had mortgaged its East Side property to buy the West Side property. (App. at pp. 31-32).

The trial court in the 1991 Trial found that the City had effected a permanent taking. (App. at pp. 2 and 32). However, in 1994, the Fourth District reversed, holding in *Yardarm I* that: (1) the facts did not support a taking claim because Petitioner had not been deprived of substantially all use of its property; (2) the trial court's findings suggesting that harassment had continued after 1981 were unsupported by the record; and (3) the statute of limitations had run on any taking claim because there was no record evidence that would support a finding that there was a taking by the City after September 15, 1983. (App. at pp. 2, 9, and 47).

Afterward, Petitioner sought review from the Florida Supreme Court and this Court, which requests were denied. 651 So. 2d 1197 (Fla. 1995); 515 U.S. 1144 (1995). The case was then remanded for reconsideration of the summary disposition of the purported substantive due process claim, however, the Fourth District expressly declined to rule on the merits of any such claim. (App. at pp. 2, and 46-47).

Thereafter, the trial court reinstated Petitioner's Complaint as a "substantive due process claim," and the case proceeded to a bifurcated trial on liability (the "1998 Trial"). (App. at pp. 2, and 10 n.3). In February 1999, the trial court entered Petitioner's proposed Judgment Determining Liability[2] (the "1999

2. The trial judge merely signed his name to the 36 page document created by Petitioner. "The cases admonishing trial courts for the verbatim adoption of proposed orders drafted by litigants are legion." *Colony Square So. v. Prudential Ins. Co.*, 819 F.2d 272, (Cont'd)

Judgment"), and the City appealed. (App. at pp. 1-3). The resulting decision by the Fourth District, (App. at pp. 1-19), reversed the 1999 Judgment in its entirety. (App. at p. 19).

## REASONS FOR DENYING THE PETITION

Petitioner essentially advances five (5) grounds upon which it suggests that this Court should grant *certiorari* review: (i) that *Yardarm II* conflicts with federal takings law; (ii) that *Yardarm II* conflicts with federal substantive due process law with respect to whether a plaintiff has substantive due process protection over state created rights; (iii) that *Yardarm II* conflicts with federal substantive due process law with respect to the concept of executive vs. legislative acts; (iv) that *Yardarm II* conflicts with federal procedural due process law; and (v) there is a need to expand the substantive component of due process to create a federal cause of action for developers whose property has not been taken and who have not been deprived of any fundamental right. None of the grounds support a case for review. The Fourth District decision did not create any conflict, let alone an intolerable conflict among the nation's lower courts. Nor did the Fourth District commit any error so important that it must be corrected immediately, and there is no need for this Court to create a federal cause of action for developers whose property has not been taken and who have not been deprived of any fundamental right.

---

(Cont'd)

274-75, 276 n.9 (11th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *see also Roberts v. Moss*, 344 F.2d 747, 752 (3d Cir. 1965); *FMC Corp. v. Varco Int'l, Inc.*, 677 F.2d 500, 502 n.2 (5th Cir. 1982); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 n.46 (11th Cir. 1997); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4 (1964).

## I. *YARDARM II* DOES NOT CONFLICT WITH FEDERAL TAKINGS LAW BECAUSE, *INTER ALIA*, THE FOURTH DISTRICT'S DECISION THAT PETITIONER'S TAKINGS CLAIM WAS BARRED AS *RES JUDICATA* WAS BASED ON FLORIDA LAW.

Petitioner first seeks review of the holding in *Yardarm II* that its federal takings claim was barred as *res judicata* under state law. The sole asserted conflict is with a decision of this Court which was not addressed in *Yardarm II* or by the trial court, and is predicated on a federal takings claim which was not even tried below.[3] Petitioner inaccurately portrays *Yardarm II* as having rejected this Court's *Agins v. City of Tiburon* decision, 447 U.S. 255 (1980), and as conflicting with this Court's subsequent "takings" cases. In fact, *Yardarm II* makes *no* reference *at all* either to *Agins* or to the federal takings issues raised by Petitioner in its Petition, and disposes of the federal takings claim *solely* on the independent state law ground that it was barred as *res judicata* under Florida law. Regardless of whether it is viewed as an issue of jurisdiction or of prudence, this Court should not address the complex takings issues raised by

---

3. The trial court's 1999 Judgment expressly recognized that the "legal principles [upon which] this case was tried" were *only* alleged violations of due process under 42 U.S.C. § 1983, and *not* federal takings claims, although the trial court also blanketly adopted in the 1999 Judgment Petitioner's proposed footnote that stated that he nonetheless "believes that the facts presented support a takings claim." (App. at p. 70). The only reference to a takings claim in the 1999 Judgment is in that cursory footnote, and nowhere is there any reference to *Agins* or any other federal takings issues. Moreover, *Yardarm I* had limited the scope of its remand to consideration by the trial court of Petitioner's federal "due process" claim, not its federal "takings" claim. (App. at pp. 46-47).

Petitioner here where those issues were not tried below, and instead were disposed of on an independent state law basis.

It is instructive that Petitioner does *not* cite to the *Yardarm II* decision it asks this Court to review in contending that the Fourth District "refus[ed] to apply" and "criticized" *Agins*, but instead only cites to the ten-year old *Yardarm I* opinion (Pet. at p. 27), which did neither.[4] First, *Yardarm I* did *not* reject *Agins* or even suggest that Florida takings law differed from the federal takings precedent it sought to follow. To the contrary, *Yardarm I* only recognized that back in 1994 confusion had arisen regarding some aspects of regulatory "takings" law,[5] but ultimately adjudicated Petitioner's takings claim based on an alternative independent state law basis. (App. at pp. 2, and 43-47).

*Yardarm I* did *not* reverse the 1991 Judgment solely because Petitioner had not shown it was denied economically viable use of its land. Instead, as was later recognized in *Yardarm II* (App. at p. 2), the Fourth District in *Yardarm I* had based its 1994 decision on an independent state law ground — Petitioner's takings claim was barred by the applicable four year statute of limitations under state law. (App. at pp. 2, and 43-47). *Yardarm I* held that even if there had been a taking of Petitioner's property as Petitioner contended, then the record demonstrated that any such taking

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4. Similarly, Petitioner cites only to the 1991 Judgment (App. at pp. 96-115) which was reversed in *Yardarm I*, (App. at pp. 22-47), rather than the 1999 Judgment, (App. at pp. 48-95), which is the subject of *Yardarm II*, (App. at pp. 22-47), in asserting that the trial court had found the City's actions were political and without relation to proper police power objectives. (Pet. at pp. 9-10).

5. In *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), this Court recognized that it had given "some, but not too specific guidance to courts" regarding regulatory takings.

had occurred more than four years before the commencement of the lawsuit in 1987, and was time-barred under Florida law. *Id.*

Importantly, *Yardarm II* did *not* decide the federal question of whether or not a takings claim can be predicated solely by proving that the denial of a building permit failed to substantially advance legitimate state interests.[6] In a plain statement of the adequate and independent state law grounds for its decision,[7] *Yardarm II* only applied Florida state law governing claim and issue preclusion in finding that its earlier decision in *Yardarm I* operated as *res judicata* with respect to any takings claim which may be encompassed by the 1999 Judgment: *Yardarm I* "in addition to being the law of the case with respect to the state law takings claim, was issue preclusion, or *res judicata*, on [Petitioner]'s federal takings claim." (App. at p. 9).[8] In turn, *Yardarm I* had decided the takings issue on an independent state law ground that the takings claim was barred by the four-year statute of limitations. (App. at pp. 2, and 43-47).

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6. The City disputes Petitioner's characterizations of the scope of *Agins* and its progeny, and of the purported "two-prong takings test." The City also disputes Petitioner's assertion that the City's actions were motivated by a desire to provide unobstructed harbor views, and failed to substantially advance legitimate state interests. However, for the reasons set forth herein, review should be denied without regard to these disputes.

7. *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983).

8. Federal claims asserted in federal court are also subject to the same preclusive *res judicata* effect of a prior state court judgment as would be given to that judgment under the law of the state in which that judgment was rendered. *Migra v. Warren City School Dist. Board of Educ.*, 465 U.S. 75, 81 (1984).

*Yardarm II* only held that *Yardarm I* operated under Florida's *res judicata* principles to bar Petitioner's federal takings claim, and did *not* seek to interpret *Agins* or this Court's federal takings precedent. Because both federal and Florida takings claims are subject to a four-year statute of limitations,[9] and Petitioner had not contended that the purported "takings" underlying its federal takings claim differed from the purported "takings" which had been at issue in *Yardarm I*,[10] the time-bar of Petitioner's state law takings claim adjudicated in *Yardarm I* operated as *res judicata* with respect to Petitioner's federal takings claim.

Although Petitioner's federal takings claim did not become ripe until after its state takings claim had been rejected in *Yardarm I*, the time-barring of the property owner's state takings claim results in a forfeiture of that property owner's federal takings claim because a property owner cannot extend the limitations period on federal takings claims by delaying to file a state takings claim until after the limitations period has expired:

> [T]he cases hold that the federal claim is unripe until state remedies are exhausted. But a claimant cannot be permitted to let the time for seeking a state remedy pass without doing anything to obtain it and then proceed in federal court on the basis that no state remedies are open.

*Gamble v. Eau Claire County*, 5 F.3d 285, 286 (7th Cir. 1993), *cert. denied*, 510 U.S. 1129 (1994); *accord Pascoag*

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9. *Daugherty v. Sarasota County*, 157 F.R.D. 542, 547 (M.D. Fla. 1994).

10. The 1999 Judgment acknowledged that "this case was tried" under the due process principles raised in Count II, rather than the "takings" claim which had been raised in Count I. (App. at p. 70).

*Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 94-95 (1st Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3292 (Oct. 17, 2003); *Vandor, Inc. v. Militello*, 301 F.3d 37, 38 (2d Cir. 2002); *Harbours Pointe of Nashotah v. Village of Nashotah*, 278 F.3d 701, 706 (7th Cir. 2002) (property owner "failed to pursue its state remedies in a timely fashion and has forfeited its right to assert a claim for just compensation under either Wisconsin or federal law").

This Court has repeatedly emphasized that in accepting jurisdiction to review a state court decision:

> it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

*Lynch v. People of New York*, 293 U.S. 52, 54 (1934). Accordingly, this Court

> will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . [R]esolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

*Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

Specifically, where a state appellate court relies upon the state law of *res judicata* to deny a federal constitutional claim, in lieu of addressing the merits of the federal claim,

then "the Court will not undertake to review it." *Durley v. Mayo*, 351 U.S. 277, 281 (1956).

Here, *Yardarm II* relied upon the independent state law of *res judicata* in denying Petitioner's federal takings claim, and the predicate for that application of *res judicata* was the *Yardarm I* decision which itself relied upon an independent state law statute of limitations defense in disposing of that takings claim.[11] Accordingly, *Yardarm II* decided an independent state law question — rather than the federal question posed by Petitioner in its Petition — in denying Petitioner relief with respect to its federal takings claim. Even if the Court had jurisdiction to review *Yardarm II* based on the federal takings question posed by Petitioner, it would not be prudent for this Court to do so on this record where the state appellate court decision under review cites only to an independent state law ground for its decision, and the federal takings claim was not even tried below. *See Adams v. Robertson*, 520 U.S. 83, 90 (1997); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988) (regardless of whether certain federal questions were sufficiently "pressed or passed upon below" in state court to satisfy the prerequisites to this Court's certiorari jurisdiction, it was not prudent to review those complex questions based on such a record).

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11. This Court has declared it will not overturn purported errors in the adjudication of state law by an intermediate state appellate court where, as here, the state supreme court has denied review of that decision. *Hicks v. Feiock*, 485 U.S. 624, 629-30 (1988). This Court also has expressed its reluctance to review the propriety of such adjudications of state law issues in the context of federal takings claims: "We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so contingent upon an analysis of state law." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 486 n.15 (1987).

In any event, even if *Yardarm I* had not been predicated upon an independent state statute of limitations defense, *Yardarm II* cannot be used to obtain belated review of *Yardarm I*'s *dictum* regarding *Agins* and "takings" law. Yardarm is seeking indirectly what it could not get directly — this Court's review of the previous Fourth District opinion in *Yardarm I*. Nine years ago, Yardarm sought review from this Court of *Yardarm I*, but its *certiorari* petition was denied. 515 U.S. 1144 (1995). Yardarm is attempting to get a second bite at the apple, and effectively asking the current Court to second-guess the denial of *certiorari* review back in 1995. It should not be permitted to do so, and the Petition should be denied.

## II. THERE IS NO DECISIONAL CONFLICT BETWEEN *YARDARM II* AND ANY APPLICABLE FEDERAL CASE CITED BY PETITIONER REGARDING WHETHER PETITIONER'S STATE CREATED RIGHTS WERE ENTITLED TO SUBSTANTIVE DUE PROCESS PROTECTION.

The Fourth District in *Yardarm II* properly, and consistent with this nation's substantive due process law, concluded that Petitioner had no substantive due process rights in its building permits because, *inter alia*, building permits are state created rights, not fundamental rights guaranteed by the Constitution, *and* the acts complained of, *i.e.*, the revocation and lapsing of Petitioner's building permits, were "executive" not "legislative." (App. at pp. 16-19).[12]

12. Specifically, the Fourth District held in pertinent part that: Yardarm may not recover for damages under its federal substantive due process claim that the City denied or delayed its building permits for improper reasons[,] [because] [a]pplying *McKinney* [*v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995)] to

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The threshold inquiry for a non-legislative substantive due process claim is whether a plaintiff has demonstrated an interest to which substantive due process protection applies.[13] *Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 139 (3d Cir. 2000). Substantive due process protects "fundamental" rights or interests that are deeply rooted in this Nation's history and tradition. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). As this Court wrote in *Glucksberg*:

> Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and

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the facts of this case, we conclude as a matter of law, that the developer had no cognizable *substantive due process claim* because its property interest in the building permits was created by state law, not the Constitution, and both the issuance and revocation of the building permits constituted executive and not legislative acts. (App. at p. 19).

13. [W]hen a plaintiff challenges the validity of a legislative act, substantive due process typically demands that the act be rationally related to some legitimate government purpose. In contrast, when a plaintiff challenges a non-legislative state action . . . we must look, as a threshold matter, to whether the property interest being deprived is 'fundamental' under the Constitution. If it is, then substantive due process protects the plaintiff from arbitrary or irrational deprivation, regardless of the adequacy of the procedures used. *If the interest is not 'fundamental,' however, the governmental action is entirely outside the ambit of substantive [due] process and will be upheld so long as the state satisfies the requirements of procedural due process.*

*Nicholas*, 227 F.3d at 142 (emphasis added).

> liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed[.]" Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," that direct and restrain our exposition of the Due Process Clause.

*Id.* at 720-21 (citations omitted); *see also City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 123 S. Ct. 1389, 1397 (2003) (Scalia, J., Thomas, J., concurring).

Justice Scalia, with whom Justice Thomas joined, recently wrote that "[t]he judicially created substantive component of the Due Process Clause protects, we have said, certain 'fundamental liberty interests' from deprivation by the government, unless the infringement is narrowly tailored to serve a compelling state interest. . . . Freedom from delay in receiving a building permit is not among these 'fundamental liberty interests.'" *Buckeye Community Hope Foundation*, 538 U.S. 188, 123 S. Ct. at 1397.

"The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation and the right to bodily integrity. . . ." *Albright v. Oliver*, 510 U.S. 266, 272 (1994). As expressed by Justice Powell in his concurrence in *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985),

> Even if one assumes the existence of a property right, [], *not every such right is entitled to the*

> *protection of substantive due process.* While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, *Board of Regents v. Roth*, 408 U.S. 564, 577 . . . (1972), *substantive due process rights are created only by the Constitution.*
>
> The history of substantive due process "counsels caution and restraint." *Moore v. East Cleveland*, 431 U.S. 494, 502 . . . (1977) (opinion of POWELL, J., for a plurality). The determination that a substantive due process right exists is a judgment that "'certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.'" *Ibid.*, quoting *Poe v. Ullman*, 367 U.S. 497, 543 . . . (1961) (HARLAN, J., dissenting). In the context of liberty interests, this Court has been careful to examine each asserted interest to determine whether it "merits" the protection of substantive due process. *See, e.g., East Cleveland, supra; Roe v. Wade*, 410 U.S. 113 . . . (1973); *Griswold v. Connecticut*, 381 U.S. 479 . . . (1965). "Each new claim to [substantive due process] protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed." *Poe, supra*, 367 U.S., at 544 . . . (HARLAN, J., dissenting).

*Ewing*, 474 U.S. at 229; *see also Brown v. Brienen*, 722 F.2d 360 (7th Cir. 1983) (holding that there was no denial of substantive due process because

> 'substantive due process' is a shorthand for the fact that the Supreme Court has interpreted the due process clause of the Fourteenth Amendment

> to confer certain substantive rights based mainly on the Bill of Rights. . . . But [where] there is nothing in the Bill of Rights about protecting [certain] rights as such[,] [s]uch rights are protected under the due process clause of the Fourteenth Amendment if at all only as a form of property, of which the state cannot deprive a person without due process of law; they are not protected by the due process clause viewed as a conduit for applying portions of the Bill of Rights to the states.

*Gardner v. City of Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992) (holding that developer plaintiffs who claimed that they were denied substantive due process by the failure of various city officials to approve proposals for development "possessed no property interest protected by the Fourteenth Amendment."); *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982); *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983) (building permit); *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1034-37 (3d Cir.) (development plan), *cert. denied*, 482 U.S. 906 (1987); *Biser v. Town of Bel Air*, 991 F.2d 100, 104 (4th Cir. 1993) (no right to special zoning exception authorizing commercial buildings in the residential area), *cert. denied*, 510 U.S. 864 (1993); *South Gwinnett Venture v. Pruitt*, 491 F.2d 5 (5th Cir.) (*en banc*) (rezoning application), *cert. denied*, 416 U.S. 910 (1974), and, *cert. denied*, 419 U.S. 837 (1974); *Burrell v. City of Kankakee*, 815 F.2d 1127 (7th Cir. 1987) (rezoning application); *Scudder v. Town of Greendale*, 704 F.2d 999 (7th Cir. 1983) (building permit); *Carolan v. City of Kansas City, Mo*, 813 F.2d 178, 181 (8th Cir. 1987) (occupancy certificate); *Sylvia Dev. Corp.*, 48 F.3d 810 (4th Cir. 1995) (no right to special zoning designation authorizing residential subdivision on agricultural land).

In *Yardarm II*, the Fourth District quoted *Reserve Ltd. v. Town of Longboat Key*, 933 F. Supp. 1040, 1043-44 (M.D. Fla. 1996), which held that:

> [a]ttempting to correct [the Eleventh] [C]ircuit's jurisprudence regarding the Fourteenth Amendment's Due Process Clause, *McKinney* holds that . . . substantive due process claims arising from non-legislative deprivations of state-created property interests are no longer cognizable. . . . In *McKinney* . . . the Eleventh Circuit distinguished between procedural and substantive due process claims in the context of state-created rights and clarified that:
>
> > The substantive component of the Due Process Clause protects those rights that are "fundamental," that is, rights that are "implicit in the concept of ordered liberty[.]" . . . [A]reas in which substantive rights are created only by state law . . . are not subject to substantive due process protection under the Due Process Clause because "substantive due process rights are created only by the Constitution." As a result, these state law based rights constitutionally may be rescinded so long as the elements of procedural-not substantive — due process are observed.
>
> 20 F.3d at 1556 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 . . . (1937), and *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 . . . (1985)) (citations omitted).

(App. at pp. 13-15).

Thus, *Yardarm II* is consistent with Eleventh Circuit substantive due process decisional law, i.e., *McKinney*, *Reserve*, and progeny,[14] which itself is now consistent with the majority of circuits throughout the country. *See Rhyce v. Martin*, 173 F. Supp. 2d 521, 531 (E.D. La. 2001) (finding that "[i]t appears that most circuits are now of th[e] view" that "property interests created by state law . . . are not subject to substantive due process protection[.]"), citing *McKinney*, 20 F.3d 1550, and *Nicholas*, 227 F.3d at 142-43; *see also Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339, 1350 (6th Cir. 1992) (concluding that plaintiff's state created right to tenured employment lacks substantive due process protection); *Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990) (holding that "[s]tate-created rights . . . do not rise to the level of 'fundamental' interests protected by substantive due process. Routine state-created [] rights are not 'deeply rooted in this Nation's history and tradition,' and, although important, are not so vital that 'neither liberty not justice would exist if [they] were sacrificed.'"), quoting *Bowers v. Hardwick*, 478 U.S. 186, 191-94 (1986), quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); and *Palko v. Connecticut*, 302 U.S. 319, 326 (1937); *Boston Envtl. Sanitation Inspectors Ass[']n v. City of Boston*, 794 F.2d 12 (1st Cir. 1986); *Schaper v. City of Huntsville*, 813 F.2d 709 (5th Cir. 1987).

Notwithstanding the decisional consistency on this substantive due process issue, the Petitioner alleges that *Yardarm II* conflicts with this Court and the rest of the nation. (Pet. at pp. 12-13). As support, Petitioner cites to *Board of*

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14. This Court previously denied McKinney's Petition for a Writ of *Certiorari* which presented the question of whether a plaintiff who has a state created property interest states a claim under the substantive component of the Due Process clause. 513 U.S. 1110 (1995).

*Regents v. Roth*, 408 U.S. 564, 577 (1972) (a procedural due process case holding that no property interest was deprived), *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 279 (1943) (a takings case), and *Sauer v. New York*, 206 U.S. 536, 548 (1907) (a condemnation proceeding). Those cases, however, only discuss the concept of property as it relates to procedural due process and/or condemnation/takings claims, and make no mention of substantive due process. Therefore they are inapposite to establish the requisite decisional conflict with *Yardarm II*'s holding regarding whether Petitioner possessed a fundamental right with respect to its building permits entitling it to substantive due process protection.[15]

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15. Similarly, *Yardarm II* does not conflict with the other cases cited in the Petition (Pet. at p. 13 n.11). Specifically, in *Natale v. Town of Ridgefield*, 170 F.3d 258 (2d Cir. 1999), the plaintiff property owner brought suit against the defendant municipality seeking recovery for the violation of his rights in the issuance of zoning and building permits. *Id.* at 261. At the trial court level, judgment was entered in favor of the plaintiff. *Id.* at 262. However, on appeal, in addition to invalidating the judgment because of an error in the jury instructions, the Second Circuit held that:

> [R]etrial is not necessary . . . because, *as a matter of law, [the plaintiff] does not have a federally protectable right in the [building] permits for which he applied.*

*Id.* at 263 (emphasis added).

In *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002), the Fourth Circuit assumed without deciding that the plaintiff had a protectable property interest, and only analyzed whether the actions taken by the government were irrational, arbitrary, or capricious to then affirm the grant of summary judgment for the government defendant on the plaintiff's substantive due process claim.

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Consequently, since the Petition does not demonstrate any conflict between *Yardarm II* and any applicable substantive due process federal decision, and in fact *Yardarm II*, and the Eleventh Circuit's *McKinney* decision and progeny upon which *Yardarm II* is based, are consistent with the decisional weight of authority throughout the country, the Petition should be denied.

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In *Bryan v. City of Madison*, 213 F.3d 267 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001), the Fifth Circuit reasoned that "[i]n order to establish a substantive or a procedural due process violation by claiming denial of a property right, [the plaintiff] must first establish a denial of a constitutionally protected property right." *Id.* at 274. Applying those principles, the Fifth Circuit held that the *Bryan* plaintiff "never had the right that he claim[ed] the defendants denied him[,]" and therefore "[b]ecause [the plaintiff] [] failed to establish the denial of a property right, his due process claim fail[ed]." *Id.* at 267.

The *Weinberg v. Whatcom County* case, 241 F.3d 746 (9th Cir. 2001), cited by Petitioner, was a procedural due process case, and did not address any substantive due process issue. And in *Crown Point I, LLC v. Intermountain Rural Elec. Assn.*, 319 F.3d 1211 (10th Cir. 2003), the Tenth Circuit held that the developer had failed to establish that it had a protectable property interest.

The *Littlefield v. City of Afton* case, 785 F.2d 596 (8th Cir. 1986), cited by Petitioner, which held that the applicant for a zoning permit had stated a substantive due process claim under Minnesota law, was subsequently overruled by *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 n.2 (8th Cir. 1992) (holding that the plaintiff developer failed to state a cause of action for violation of substantive due process rights due to the city's enforcement of an invalid zoning plan ordinance).

## III. THERE IS NO DECISIONAL CONFLICT BETWEEN *YARDARM II* AND ANY SUBSTANTIVE DUE PROCESS CASE CITED BY PETITIONER ANALYZING THE EXECUTIVE VS. LEGISLATIVE DISTINCTION. *YARDARM II* PROPERLY HELD THAT PETITIONER HAS NO SUBSTANTIVE DUE PROCESS CLAIM WITH RESPECT TO ITS BUILDING PERMITS BECAUSE, *INTER ALIA*, THE ACTS COMPLAINED OF WERE "EXECUTIVE" NOT "LEGISLATIVE."

*Yardarm II* did not hold that "[substantive] due process violations can only be committed by an official vote of the local legislative body." (Pet. at pp. i, and 13-17). As has been the case throughout these proceedings, Petitioner has confused the executive vs. legislative analysis required in *substantive due process* claims, with the "state actor" analysis inherent in all § 1983 claims, to erroneously argue that *Yardarm II* conflicts with other decisions.

As aptly described by the Third Circuit, "the fabric of substantive due process, as woven by our courts, encompasses at least two very different threads." *Nicholas*, 227 F.3d at 139. "The first thread of substantive due process applies when a plaintiff challenges the validity of a *legislative* act."[16] *Id.* (emphasis in original). The second thread of substantive due process protection applies to "non-legislative" or "executive" acts.[17] *Nicholas*, 227 F.3d at 139. Thus, the legislative vs.

16. If it does not involve a fundamental right, a substantive due process challenge to a legislative act is reviewed under a rational basis test. *See TRM, Inc. v. United States*, 52 F.3d 941, 945 (11th Cir. 1995).

17. State created or non-fundamental rights taken away by executive action do not form the basis for a substantive due process

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executive distinction is important to determine which "thread" to use.

In a substantive due process analysis, the difference between "legislative" and "executive" acts turns on who was affected. Executive acts apply generally to only one person, while legislative acts apply to all of society. *McKinney*, 20 F.3d at 1557 n. 9; *Collins & Co., Inc. v. City of Jacksonville*, 38 F. Supp. 2d 1338, 1342 (M.D. Fla. 1998); *Crymes v. Dekalb County, Georgia*, 923 F.2d 1482, 1485 (11th Cir. 1991); *Nicholas*, 227 F.3d at 139 n.1.

Here, the Fourth District properly applied federal law on this issue and concluded in *Yardarm II* that Petitioner had no substantive due process claim respecting the issuance and/or lapsing of its building permits because, *inter alia*, *those acts complained of were "executive" not "legislative."* (App. at pp. 16-19). *Yardarm II*'s conclusion was based on, *inter alia*, the fact that Petitioner never challenged any legislative enactment of any ordinance or regulation by the City Commission. Rather, Petitioner challenged the application by City employees and administrative officials of certain rules and ordinances specifically to Petitioner, which are clearly executive acts under the substantive due process analysis. *See, e.g., Wohl v. City of Hollywood*, 915 F. Supp. 339, 343 (S.D. Fla. 1995). Moreover, to this day, Petitioner provides no authority to support the position that the issuance and/or lapsing of building permits, are anything but executive acts.

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claim. *Id.*; *McKinney*, 20 F.3d at 1557 n.9; *North Florida Educ. Dev. Corp. v. Woodham*, 942 F. Supp. 542, 549 (N.D. Fla. 1996), *appeal at* 138 F.3d 955 (11th Cir. 1998); *Williams v. Goldsmith*, 905 F. Supp. 996, 1000 (M.D. Ala. 1995).

Thus, *Yardarm II* is consistent with Eleventh Circuit substantive due process precedent, *e.g.*, *McKinney* and progeny, which itself is consistent with the rest of the country.

The cases cited by Petitioner do not change the reality that for substantive due process purposes the acts complained of were "executive" not "legislative." Notably, neither *Monell v. Department of Soc. Serv. of the City of New York*, 436 U.S. 658 (1978); *City of St. Louis v. Praprotnik.* 485 U.S. 112 (1988); *Harman v. Forssenius*, 380 U.S. 528, 540 (1945); *Hughes v. Washington*, 389 U.S. 290, 298 (1967); *DeCarlo v. Fry*, 141 F.2d 56 (2d Cir. 1998); nor *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), cited by Petitioner (Pet. at p. 15), address substantive due process or the executive vs. legislative distinction there under. Instead, those cases deal with the issue of whether there could be municipal liability at all under 42 U.S.C. § 1983, which in the instant case was yet another fatal hurdle Petitioner was unable to overcome.[18]

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18. Petitioner misquotes *DeCarlo* and *Bohen v. City of East Chicago*, 799 F.2d 1180, 1189 (7th Cir. 1986), to attempt to create decisional conflict where none exists. (Pet. at pp. 15-16).

Moreover, neither *Nicholas*, 227 F.3d 133, nor *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983), cited by Petitioner, conflict with *Yardarm II.* In *Nicholas*, consistent with *Yardarm II*, *McKinney*, etc., the court held that to prevail on a *non-legislative* substantive due process claim, a plaintiff must establish he has a protected property interest. *Nicholas*, 227 F.3d. at 139-40. As to Petitioner's reliance on *Scott*, 716 F.2d 1409, to assert conflict, in *Scott*, the developer seeking the permit had already received informal approval that his proposed use was expressly reflected in the zoning classification required. *Id.* He was then informed by the legislative body, the County Council, that the area including his proposed development would be rezoned (a legislative act), and he would no longer be eligible for a permit. *Id.* These facts do not appear in the instant case. *Id.*

Thus, since there is no conflict here between *Yardarm II* and the decisions cited by Petitioner on the executive vs. legislative substantive due process issue, the Petition should be denied.

## IV. THERE IS NO DECISIONAL CONFLICT REGARDING PROCEDURAL DUE PROCESS PRESENTED BY *YARDARM II*.

In *Yardarm II*, the Fourth District indicated that the portion of the 1999 Judgment finding Petitioner's procedural due process rights violated was erroneous, because, *inter alia*, Petitioner never pled nor tried any procedural due process claim. (App. at pp. 10-11). Petitioner's purported "procedural due process" claim was therefore disposed of on the independent state law ground that it was barred under Florida law by Petitioner's failure to plead. Thus, this Court should not address the complex procedural due process issues raised by Petitioner here where those issues were not tried below, and were disposed of on an independent state law basis.

Petitioner's reliance on the Fourth District's *dicta*, wherein it indicated that had Petitioner pled or tried a procedural due process claim, such a claim still failed because there was no deprivation and, even if there were, Petitioner was provided all the process it was due (App. at pp. 10-11), is misplaced.

First, as aptly discussed by the Fourth District, and undisputed by Petitioner, with respect to the City's attempt (in 1985) to repeal Petitioner's 1973-74 special use exception (after Petitioner had failed to use it in over ten (10) years), the ordinance to repeal the special exception was never actually enacted and *Petitioner's special exception was never repealed*. (App. at p. 11). "Hence," the Fourth District stated, "assuming, for the sake of argument, that [Petitioner] had an

interest in the special exception, *it was never deprived of it.*" (App. at p. 11) (emphasis added).

Such reasoning by the Fourth District is completely consistent with procedural due process law throughout the country which requires that there be a "deprivation."

Second, with respect to the Fourth District's discussion in *dicta* regarding the acts by the Building Official on Petitioner's building permits that were complained about, i.e., the revocation of Petitioner's building permit in 1974 for failure to comply with applicable codes and regulations, and the lapsing of Petitioner's building permit by operation of the South Florida Building Code in 1979 and 1985 due to lack of progress, there is no conflict between the Fourth District's reasoning that since Petitioner had the right to administratively appeal to the Broward County Board of Rules of Appeals ("BCBRA"), with alternative and/or further review by the circuit court, Petitioner had been provided with adequate procedural due process.[19]

The Fourth District's reasoning was again based on Eleventh Circuit law, including, among other decisions, *Boatman v. Town of Oakland*, 76 F.3d 341 (11th Cir. 1996) (holding that property owners' civil rights action against a town for its refusal to issue them a certificate of occupancy did not fall under the procedural component of § 1983 because the state provided them all the process they were due, i.e., the right to repair to the circuit court and seek an order compelling a final inspection).

The Eleventh Circuit decisional law on this topic is likewise consistent with its sister circuits which almost

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19. Contrary to the representations in the Petition (pp. 20-21), no hearings are required by law or otherwise *before* a building permit lapses for lack of progress under the South Florida Building Code.

uniformly hold that a state provides constitutionally adequate procedural due process when it provides reasonable remedies to rectify a legal error by a local administrative body. *See, e.g., Midnight Sessions, Ltd. v. Philadelphia*, 945 F.2d 667, 680 (3d Cir. 1991) (holding that city provided adequate procedural due process where judicial mechanism existed under which to challenge administrative decision to deny application for dance hall licenses), *overruled on other grounds by United Artists*, 316 F.3d at 400. Moreover, when a state affords a "full judicial mechanism" with which to challenge administrative decisions . . . , the state provides adequate procedural due process, regardless of whether the plaintiff avails itself of that appeal mechanism. *Id.*; *see also Crocker v. Hakes*, 616 F.2d 237 (5th Cir. 1980) (holding that where the plaintiff was granted a hearing before the City Council, and as a result of his petition in state court, he received a hearing before the Board of Zoning Appeals, and had the right to seek relief in state court, there already exists a state created avenue for review that satisfies due process).

Here, it is undisputed that Petitioner was aware of its right to, and actually did, repair to the BCBRA and/or circuit courts, or unilaterally chose not to.

Thus, since *Yardarm II*'s holding on Petitioner's purported procedural due process claim was based on an independent state law ground, and in any event the Fourth District's reasoning does not conflict with federal decisional law, the Petition should be denied.

## V. THE PETITION PRESENTS NO INTOLERABLE CONFLICT AMONG THE NATION'S LOWER COURTS, NO CONFUSION OR ERROR SO IMPORTANT THAT IT MUST BE CORRECTED IMMEDIATELY, AND NO NEED FOR THE COURT TO EXPAND THE SUBSTANTIVE COMPONENT OF DUE PROCESS.

As its fifth "ground" for review, Petitioner attempts to convince this Court that there is a need to expand the substantive component of due process to create a federal cause of action for developers whose property has not been taken and who have not been deprived of any fundamental right. Yet, to do what the Petitioner requests would upset settled expectations, start the Court sliding down a slippery slope, and otherwise confuse the law.

Contrary to the representations by Petitioner, this case involves a local land-use dispute, and resolving such routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is not the business of the federal courts. As has been repeatedly recognized, "allowing 'every allegedly arbitrary denial by a town or city of a local license or permit' to be challenged under [federal law] would 'swell[] our already overburdened federal court system beyond capacity.'" *Gardner*, 969 F.2d at 68, quoting *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985).

Petitioner would endow every disappointed property owner with a federal claim, because every appeal from an adverse ruling necessarily encompasses a claim that the determination by the local agency was, from the owner's point of view, irrational, arbitrary, capricious and an abuse of the agency's discretion. *Cf. Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982), *cert. denied*,

459 U.S. 989 (1982). Petitioner's position is inconsistent with the oft-stated admonition that federal courts should not be converted into super zoning boards or zoning boards of appeal. *See, e.g., Raskiewicz v. Town of Boston*, 754 F.2d 38, 44 (1st Cir.), *cert. denied*, 474 U.S. 845 (1985); *Albery v. Reddig*, 718 F.2d 245 (7th Cir. 1983); *Construction Industry Ass'n Sonoma Cty. v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). This Court should not accept Petitioner's invitation to create "a rack upon which every disappointed developer can stretch a community that fails to roll out the red carpet for him." *Chongris v. Board of Appeals of Town of Andover*, 811 F.2d 36, 46 (1st Cir.), *cert. denied*, 483 U.S. 1021 (1987).

As explained in *Creative Environments, Inc.*:

> Such a claim is too typical of the run of the mill dispute between a developer and a town planning agency, regardless of [plaintiff's] characterizations of it and of defendants' alleged mental states, to rise to the level of a due process violation. The authority . . . , all suggest that the conventional planning dispute — at least when not tainted with fundamental procedural irregularity, racial animus, or the like — which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less "distort" the state scheme under which they operate. A federal court, after all, "should not ... sit as a zoning board of appeals." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 12 . . . (1974) (Marshall, J., dissenting). *Every* appeal by a

> disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983. As has been often stated, "[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution." *Crocker v. Hakes*, 616 F.2d 237, 239 n.2 (5th Cir. 1980) (*per curiam*).

*Id.* at 833 (emphasis in original) (footnote omitted). The First Circuit has recently reaffirmed this ruling. *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), *cert. dismissed as improvidently granted*, 503 U.S. 257 (1992).

Consequently, this Court should not accept Petitioner's invitation to expand the substantive component of due process to create a federal cause of action for developers whose property has not been taken and who have not been deprived of any fundamental right, because to do so would, *inter alia*, upset settled expectations, start the Court sliding down a slippery slope, and otherwise confuse the law.

## CONCLUSION

Since none of the grounds asserted by Petitioner support a case for review, because, *inter alia*, the Fourth District decision did not create any conflict, let alone an intolerable conflict among the nation's lower courts, the Fourth District did not commit any error, let alone an error so important that it must be corrected immediately, and there is no need for this Court to expand the substantive component of due process to create a federal cause of action for developers whose property has not been taken and who have not been deprived of any fundamental right, Respondent, the City of Pompano Beach, respectfully requests the Court to deny the Petition for a Writ of *Certiorari*.

Respectfully submitted,

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No. 03-531

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In The

# Supreme Court of the United States

YARDARM RESTAURANT, INC.,

*Petitioner,*

v.

THE CITY OF POMPANO BEACH,

*Respondent.*

**On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fourth District**

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS


Page

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI ..... 1

INTRODUCTION ..... 1

I. FLORIDA WILL NOT APPLY THIS COURT'S DISJUNCTIVE TEST FOR A REGULATORY TAKING. CERTIORARI IS NECESSARY TO PROTECT FLORIDA LAND OWNERS ..... 1

II. A STATE COURT MAY NOT INTERPRET STATE LAW TO PROVIDE *LESS* PROTECTION TO INDIVIDUALS THAN THE U.S. CONSTITUTION ..... 5

III. THIS IS NO "MERE DELAY" CASE. RATHER, IT IS BASED ON A COURSE OF WILLFUL GOVERNMENTAL MISCONDUCT OF A KIND THAT IS (THANKFULLY) ONLY SELDOM SEEN, BUT THAT MUST BE REMEDIED WHEN IT APPEARS ..... 6

IV. YARDARM HAS NEITHER ASKED THIS COURT TO EXPAND THE CONCEPT OF SUBSTANTIVE DUE PROCESS NOR TO CREATE SOME NEW CAUSE OF ACTION. RATHER, YARDARM HAS ASKED THIS COURT TO *APPLY EXISTING* SUBSTANTIVE DUE PROCESS CONCEPTS TO CASES OF OUTRAGEOUS GOVERNMENT CONDUCT – LIKE THIS ONE ..... 7

CONCLUSION ..... 8

TABLE OF AUTHORITIES

Page

CASES:

*Agins v. City of Tiburon*, 447 U.S. 255 (1980) ..... 2, 3

*Boling v. U.S.*, 220 F.3d 1365 (Fed. Cir. 2000) ..... 3

*Boston Chamber of Commerce v. Boston*, 217 U.S. 189 (1910) ..... 9

*Brenner v. Local 514*, 927 F.2d 1283 (3d Cir. 1991) ..... 3

*City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) ..... 7

*Davis v. Wechsler*, 263 U.S. 22 (1923) ..... 5

*Department of Transp. v. Weisenfeld*, 617 So.2d 1071 (Fla. App. 1993) ..... 2

*Henry v. Mississippi*, 379 U.S. 443 (1965) ..... 3

*Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668 (1932) ..... 6

*Sibron v. New York*, 392 U.S. 40 (1968) ..... 5

*State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002) ..... 2

*Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302 (2002) ..... 7

*Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So.2d 54 (Fla. 1994) ..... 2

*U.S. v. Cors*, 337 U.S. 325 (1949) ..... 7

*U.S. v. Dickinson*, 331 U.S. 745 (1947) ..... 4

*U.S. v. General Motors*, 323 U.S. 373 (1945) ..... 9

TABLE OF AUTHORITIES – Continued

Page

*Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)..... 7

*Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985) ..... 3

## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## INTRODUCTION

If Yardarm's Petition for Writ of Certiorari is as legally deficient as asserted by the City of Pompano Beach and its Amicus, the Broward County League of Cities, one wonders why they needed 37 pages of argument and citation of 88 cases to so demonstrate.

The blunt fact is that the treatment it meted out to Yardarm was so outrageous that the City is not able to defend it. Instead, it seeks to gloss over the facts and becloud the issues with inapposite case law.

The core of this case is that a constitutional outrage was committed by the City, and the Florida courts gave it their blessing. This Court's intervention is amply warranted to return Florida to the constitutional fold and to clarify the 5th Amendment protection of land owners against takings and due process violations.

## I. FLORIDA WILL NOT APPLY THIS COURT'S DISJUNCTIVE TEST FOR A REGULATORY TAKING. CERTIORARI IS NECESSARY TO PROTECT FLORIDA LAND OWNERS.

The City asserts there is an "independent" state ground for the decision that cannot be reached by this Court, i.e., the statute of limitations barred the action.

The City is wrong, both on its own premise (see *post*, pp. 4-5) and because its argument addresses the wrong constitutional injury. The City pretends that the taking was only temporary and ended in 1981 when, in

fact, a permanent taking occurred in 1986, thus starting a new limitations period for the latter taking.

This is this Court's first opportunity to review Yardarm's case as a matter of *federal* constitutional law. *Yardarm I* (App., p. 22) decided only that the City prevailed as a matter of *state* constitutional law. (App., p. 37.)[1] But Florida's takings law deliberately refuses to employ this Court's disjunctive test for a taking under *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), i.e., that a taking occurs if local government action *either* fails to substantially advance a legitimate state interest *or* deprives the land owner of economically viable use of property. Florida denies the first alternative in that formula, employing only the second.[2]

In noteworthy contrast to Florida, the Ohio Supreme Court recently re-examined its position (which *had been* the same as Florida's) and conceded its error by holding that "[s]atisfaction of either prong of the *Agins* test establishes a taking." (*State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345, 351 [Ohio 2002].)

This Court now has the opportunity to examine *ab initio* whether the takings test it articulated in *Agins* means

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1 Although (out of an abundance of caution) Yardarm petitioned for Certiorari in *Yardarm I*, it was unsurprisingly denied [515 U.S. 1144] because — being from a decision of *state* law — it could not present any *federal* issue for review.

2 See, in addition to the opinion below (App., p. 38), *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So.2d 54, 58 (Fla. 1994); *Department of Transp. v. Weisenfeld*, 617 So.2d 1071, 1073-1074 (Fla. App. 1993). The City confirms this by denigrating *Agins* as providing only a "purported" test. (Br. in Opp., p. 7, fn. 6.)

what it says, and whether the facts below establish a takings claim as a matter of *federal* law, which is binding on Florida officials under the Supremacy Clause.

*First*, when *Yardarm I* remanded the case for trial of the due process claims (App., p. 47) it must have intended that a trial on the merits ensue. Otherwise its opinion would make no sense.

*Second*, the trial court then properly addressed the *federal* takings claim, which became ripe only after the state takings claim was concluded in *Yardarm I*. (See *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172, 194-195 [1985].)

*Third*, the decision below could not be an adequate and independent state ground because the Florida appellate courts truncated the *Agins* rule in *Yardarm I* and then abused that holding with respect to a *temporary* taking under *state* law to reverse (in *Yardarm II*) the judgment that a *permanent federal* taking had occurred. The constitutionality of that action presents a federal question. (See *Henry v. Mississippi*, 379 U.S. 443, 447 [1965].)

*Fourth, the second trial considered facts not available* in *Yardarm I*. (App., pp. 50-51.) They showed that the City's concerted actions continued through 1986, when Yardarm lost the property through foreclosure, thus making the taking permanent then. (App., pp. 61-68.) As the trial court found, that resulted directly from the City's continuous course of conduct toward Yardarm. (App., pp. 57, 112.) Whatever Florida holds, continuous wrongdoing extends the statute of limitations *as a matter of federal law*. (E.g., *Brenner v. Local 514*, 927 F.2d 1283, 1295 [3d Cir. 1991]; *Boling v. U.S.*, 220 F.3d 1365, 1371 [Fed. Cir. 2000].)

*Finally*, the most that *Yardarm I* could have held time-barred was a claim for a *temporary* taking that ended

in 1980. (See App., pp. 45-46.) But the subject of *Yardarm II* was a new, *permanent* taking. The property had been lost due to the City's actions, and the City had bought it out of foreclosure from the lender. That is when Yardarm's damages fully accrued and stabilized, and that is when the federal limitations period began. (*U.S. v. Dickinson*, 331 U.S. 745, 749 [1947].) The difference in applying the statute of limitations to temporary, as opposed to permanent, takings was explained recently by the Court of Appeals for the Federal Circuit, the court that hears all takings appeals against the federal government:

> "In other words, stabilization occurs when it becomes clear that the gradual process set into motion by the government has effected a *permanent* taking . . . . Thus, during the time when it is uncertain whether the gradual process will result in a *permanent* taking, the *plaintiff need not sue*, but once it is clear that the process has resulted in a *permanent* taking and the extent of the damage is reasonably foreseeable, the claim accrues and the statute of limitations begins to run." (*Boling*, 220 F.3d at 1371; emphasis added.)

The validity and timeliness of the *federal permanent* takings claim as a matter of *federal* law was not addressed in *Yardarm I* because that claim did not yet exist. The trial court examined it in *Yardarm II*. State practice, as this Court held through Justice Holmes, cannot stand in the way of the federal Constitution: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and

reasonably made, is not to be defeated under the name of local practice." (*Davis v. Wechsler*, 263 U.S. 22, 24 [1923].)

## II. A STATE COURT MAY NOT INTERPRET STATE LAW TO PROVIDE *LESS* PROTECTION TO INDIVIDUALS THAN THE U.S. CONSTITUTION.

The City's argument that *Yardarm I* rested on Florida law (Br. in Opp., pp. 7-8), proves too much. It assumes that Florida may interpret its constitution in a way that *denies* citizens the full 5th Amendment protection mandated by this Court. That has never been the law.

As this Court firmly held in *Sibron v. New York*, 392 U.S. 40, 60-61 (1968):

> "New York is, of course, free to develop its own law of search and seizure to meet the needs of local law enforcement, [citation] and in the process it may call the standards it employs by any names it may choose. It may not, however, authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct. The question in this Court upon review of a state-approved search or seizure 'is not whether the search [or seizure] was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment.' "

Thus, while allowing states substantial freedom to adopt and enforce their own constitutions and statutes, this Court has made it clear that the requirements of the U.S. Constitution establish the "minimum" protection to which all

are entitled. The freedom which states enjoy, in takings cases like any others, is to provide *more* protection than that, not less. (*Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676-677 [1932].)

## III. THIS IS NO "MERE DELAY" CASE. RATHER, IT IS BASED ON A COURSE OF WILLFUL GOVERNMENTAL MISCONDUCT OF A KIND THAT IS (THANKFULLY) ONLY SELDOM SEEN, BUT THAT MUST BE REMEDIED WHEN IT APPEARS.

The City seeks to sweep this case under a rug by labeling it one of "mere delay" in obtaining permits. (E.g., Br. in Opp., p. 13.) That only shows how fervently the City tries to evade the actual facts, which were extensively discussed in the Petition (Pet., pp. 5-8, 18-19), and need not be repeated here.

Suffice it to say that if delay were all that was involved below, no suit would have been filed. This case, however, involves years of underhanded, illegal, secretive, and conspiratorial conduct by the highest officials of the City. Their goal — as two trial judges found on ample evidence that was largely undisputed by the City and not questioned by the Court of Appeal — was to prevent Yardarm from developing a perfectly legal hotel and marina on land that the City itself had planned and zoned for just such use. The City defied repeated state court judgments and forced Yardarm to sue repeatedly in state court solely to compel it to comply with crystal-clear law.

Yardarm believes that such blatant and extensive misconduct is not the routine way that American cities go about their governance. However, when cities like

Pompano Beach turn rogue, the law must provide some remedy.[3] This Court put it both bluntly and clearly when it concluded that "[t]he political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." (*U.S. v. Cors*, 337 U.S. 325, 332 [1949].)

Florida's appellate courts have stripped that state's law of any remedy for egregious municipal misconduct. This Court's aid is needed not only to interdict Florida's lawlessness, but to make clear to other jurisdictions that such conduct is beyond the constitutional pale.

## IV. YARDARM HAS NEITHER ASKED THIS COURT TO EXPAND THE CONCEPT OF SUBSTANTIVE DUE PROCESS NOR TO CREATE SOME NEW CAUSE OF ACTION. RATHER, YARDARM HAS ASKED THIS COURT TO *APPLY EXISTING* SUBSTANTIVE DUE PROCESS CONCEPTS TO CASES OF OUTRAGEOUS GOVERNMENT CONDUCT — LIKE THIS ONE.

The City and its amicus have mischaracterized the Petition, claiming either that Yardarm seeks some radical expansion of substantive due process (Br. in Opp., p. 26)

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[3] As this Court has noted repeatedly in recent years, in those rare cases involving bad faith on the part of government, constitutional liability should follow. (See *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 333 [2002]; *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 698 [1999]; *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 [2000].)

or the creation of an entirely new (and heretofore unknown) cause of action (League of Cities, p. 6).

Both are wrong. Yardarm merely pointed out the obvious, i.e., that the current Florida rules of regulatory takings requiring total economic destruction of private property before liability attaches leave grievously damaged property owners without any takings remedy. Concomitantly, the lower courts' invocation of stringent rules for applying substantive due process to cases involving land use have rendered that avenue of relief likewise illusory.

All Yardarm asked of the Court was that it examine this unwarranted jurisprudential gap whereby citizens subjected to arbitrary, vicious municipal misconduct are said to have no redress at all in the Southeastern United States unless the harm inflicted on them is so severe as to leave them with nothing.

There are two forms of potential 5th Amendment relief — for takings and denial of due process. This Court's jurisprudence allows people like the Stephanis brothers in this case to have a realistic chance at obtaining constitutional relief. The Florida appellate courts have made that virtually impossible. That result is so at odds with this Court's holdings that intervention is necessary to re-align Florida law with this Court's standards requiring civilized behavior on the part of municipal functionaries. There's nothing revolutionary in asking that.

## CONCLUSION

The City's Brief in Opposition is exemplary for its obfuscatory argument. It refuses to deal with the focal points of this Petition. *First*, the City's highest officials conspired to violate the City's own laws, as well as the

Constitution, in order to prevent Yardarm from developing a hotel on property the City had planned and zoned precisely for that use.[4] *Second*, there was little dispute in the evidence. The City simply took the position that the outrageous actions of its governing officials were perfectly acceptable. But they are not acceptable in a constitutional society like ours, and trial judges kept telling the City so. The problem is that Florida's appellate judiciary has written Florida law so that it undercuts the protection that this Court has carefully laid out for property owners under the 5th Amendment. *Third*, the law in Florida fails constitutional examination.

The issues in this case, as demonstrated by the amicus briefs filed in support of both sides, go far beyond Yardarm and Pompano Beach.[5] This case presents the Court with the opportunity to set some clear ground rules and (perhaps) eliminate some of the contentiousness from land use disputes. When people — on all sides of the issue

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[4] The eventual impact of that was a permanent taking when Yardarm lost its property — all of it — and the City acquired it at a bargain price from the foreclosing lender. Takings are measured by the impact on the owner. (*Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 [1910]; *U.S. v. General Motors*, 323 U.S. 373, 378 [1945].) That permanent taking is what this case is about.

[5] In this connection, we particularly commend to the Court's attention the straightforward brief filed in support of Yardarm by Dale Ledbetter. Mr. Ledbetter is simply a resident of Broward County, Florida, who has followed the news coverage of this case over the years and was so outraged by what the City had perpetrated that he filed his own brief urging this Court to intervene .

— know what the rules are, they can generally adapt. When, however, they know only that the rules are made up *ad hoc* for each case, litigation perpetuates.

Yardarm prays that certiorari be granted to bring some rationality to this field of law, and a measure of justice to the Stephanis brothers.

Respectfully submitted,

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In The

# Supreme Court of the United States

YARDARM RESTAURANT, INC.,

*Petitioner,*

*v.*

THE CITY OF POMPANO BEACH,

*Respondent.*

On Petition For A Writ Of Certiorari
To The District Court Of Appeal Of Florida,
Fourth District

## MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The National Association of Home Builders ("NAHB") respectfully requests leave from this Court to file the attached brief as *amicus curiae* in support of the Petitioner's request for a writ of certiorari. A letter of consent for filing of the brief from Petitioner has been filed with the Clerk of the Court. The City of Pompano refused to stipulate to the filing of *amicus curiae* briefs and has neither consented to, nor denied consent for, the filing of this brief.

NAHB wishes to bring to the Court's attention differing theories on when a property right exists for Constitutional purposes and to explain why the court below was incorrect in following the 11th Circuit's substantive due process analysis.

NAHB represents over 211,000 builder and associate members throughout the United States. Its members include not only individuals and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Many of NAHB's members own and develop land. Therefore, NAHB is knowledgeable of the inequitable regulatory actions and time-consuming processes that are often involved with land development.

NAHB has been before the Court as an *amicus curiae* or as "of counsel" to the landowner in a host of critical land regulation cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co.*

*v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, 122 S. Ct. 1465 (2002); *Borden Ranch Partnership v. United States Army Corps of Engineers*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003).

As a result, NAHB believes that it will provide the Court with particular insight into the issues presented by this case.[1]

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. The brief was not written in whole or part by counsel for a party, and no one other than amicus made monetary contribution to its preparation.

## TABLE OF CONTENTS

Page

Motion for Leave to File *Amicus Curiae* Brief ..... i

Table of Contents ..... iii

Table of Authorities ..... iv

Introduction ..... 1

Argument in Support of Granting Writ ..... 3

I. Two Theories on Whether Real Property is Worthy of Constitutional Protection ..... 3

A. The "Entitlement Approach" ..... 3

1. *Roth* and *Perry* ..... 3
2. "Entitlement" in Land Use ..... 4

B. Ownership is a Protectable Right ..... 6

II. Disagreement Over the Review of Executive Acts That May Rise to the Level of Substantive Due Process Violations ..... 8

A. Most Federal Courts Agree That Executive Acts are Reivewable ..... 8

B. The 11th Circuit and Florida Courts Are Drawing an Improper Conclusion About Executive Activity ..... 11

Conclusion ..... 13

## TABLE OF AUTHORITIES

**Cases** **Page (s)**

*Allgeyer v. Louisiana,* 165 U.S. 578 (1897)..... 1

*Bituminous Materials, Inc. v. Rice County,*
126 F.3d 1068 (8th Cir. 1997)..... 5

*Board of Regents of State Colleges v. Roth,*
408 U.S. 564 (1972)..... 3, 4

*Bowers v. City of Flint,* 325 F.3d 758
(6th Cir. 2003)..... 10

*Brock v. Roadway Exp., Inc.,* 481 U.S. 252 (1987) .... 1

*Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls,*
263 F.3d 627 (6th Cir. 2001)..... 5, 10

*City of Pompano Beach v. Yardarm Rest., Inc.,*
834 So.2d 861 (Fla. App. 4 Dist. 2002).... 2, 3, 11, 12

*Collins v. City of Harker Heights, Texas,*
503 U.S. 115, (1992)..... 9

*County of Sacramento v. Lewis,*
523 U.S. 833 (1998)..... 11

*Dale v. Town of Elsmere,* 702 A.2d 1219
(Del. 1997)..... 7

*Daniels v. Williams,* 474 U.S. 327 (1986) ..... 1

*DeBlasio v. Zoning Bd. of Adjustment for West Amwell*, 53 F.3d 592 (3rd Cir. 1995) ..... 6

*Foucha v. Louisiana*, 504 U.S. 71 (1992) ..... 8

*George Washington Univ. v. District of Columbia*, 318 F.3d 203 (D.C. Cir. 2003) ..... 5

*Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979) ..... 12

*Gundling v. Chicago*, 177 U.S. 183 (1900) ..... 1

*Harlen Assocs. v. Incorporated Village of Mineola*, 273 F.3d 494 (2nd Cir. 2001) ..... 5

*Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999) ..... 10

*Hunterson v. DiSabato*, 308 F.3d 237 (3rd Cir. 2002) ..... 8

*Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) ..... 10

*Macone v. Town of Wakefield*, 277 F.3d 1 (1st Cir. 2002) ..... 4

*McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) ..... 12

*Miller v. City of Philadelphia*, 174 F.3d 368 (3rd Cir. 2000) ..... 8

*Morris v. Dearborne*, 181 F.3d 657 (5th Cir. 1999) ..... 9

*Nicholas v. Pennsylvania State University*,
227 F.3d 133 (3rd Cir. 2000)..... 9

*Perry v. Sindermann*, 408 U.S. 593 (1972)..... 4

*Petta v. Rivera*, 143 F.3d 895 (5th Cir. 1998)..... 9

*Polenz v. Parrott*, 883 F.2d 551 (7th Cir. 1989)..... 7

*Putnam v. Keller*, 332 F.3d 541 (8th Cir. 2003)..... 10

*Reserve v. Town of Longboat Key*, 933 F. Supp. 1040
(M.D. Fla. 1996)..... 12

*Reserve, Ltd. v. Town of Longboat Key*,
17 F.3d 1374 (11th Cir. 1994)..... 5, 12

*River Park, Inc. v. City of Highland*,
23 F.3d 164 (7th Cir. 1994)..... 6, 7

*Spinell Homes, Inc. v. Municipality of Anchorage*,
2003 WL 21994972 (Alaska Aug. 22, 2003)..... 5

*Teer v. State*, 738 N.E.2d 283 (Ind. Ct. App. 2000).... 7

*Tri County Landfill Ass'n, Inc. v. Brule County*,
641 N.W.2d 147 (S.D. 2002)..... 5

*Village of Willowbrook v. Olech*,
528 U.S. 562 (2000)..... 12

*Yardarm Restaurant v. City of Pompano Beach*, No.
87-19652 (18) (Fla. Cir. Ct. Feb. 23, 1999)..... 6, 10

**U.S. Constitution**

U.S. Const. Amend XIV, § 1 ..... 1

**Statutes and Regulations**

42 U.S.C. § 1983 ..... 12

**Other**

Kenneth B. Bley, Tina R. Axelrad, *The Search for Constitutionally Protected "Property" In Land-Use Law,* 29 Urb. Law. 251 (1997) ..... 4

Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation,* 3 Wash U. J.L. & Pol'y 61 (2000) ..... 4

## INTRODUCTION

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, §1. This Court has developed an interpretation of the Due Process clause that protects one's basic substantive rights, in addition to the right to process. "Substantive due process" guarantees that a state cannot take away a person's life, liberty or property without appropriate governmental justification, regardless of the government's procedures. *See, e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) (explaining that the due process clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them . . ."); *Gundling v. Chicago*, 177 U.S. 183, 188 (1900) (explaining that it is possible for a state to deprive property rights by unreasonable legislation); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (recognizing that "liberty" means more than a person's right to be free from incarceration, but also to be free to "live and work where he will" and enter into proper contracts).

NAHB disagrees with the federal substantive due process interpretation of the Florida District Court of Appeals and urges this Court to grant certiorari to review two fundamental discrepancies occurring in that due process analysis.

First, when a claimant argues that the government has substantively deprived him of his property without due process of law, the claimant must initially prove that he has a property right that the Constitution protects. *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 260 (1987). The

Court should resolve the conflict among the circuits concerning whether land ownership is a property right worthy of federal substantive due process protections.

Second, the Court should clarify that executive actions, in addition to legislative decisions, qualify for review for federal substantive due process violations. The court of appeals in Florida has decided that property rights subject to government action by an administrative body are not worthy of such constitutional protections. *City of Pompano Beach v. Yardarm Rest., Inc.*, 834 So.2d 861, 869 (Fla. App. 4 Dist. 2002) (finding that "substantive due process protects against arbitrary legislative action, not arbitrary executive action."). While courts may disagree on the standard of review for substantive due process violations in the land use context, the lower court's wholesale limitation on considering administrative actions is contrary the holdings of most state and federal courts, including this Court. A severe limitation of this type on constitutional protections is an important federal question that must be addressed by this Court.

## ARGUMENT IN SUPPORT OF GRANTING WRIT

### I. Two Theories on Whether Real Property is Worthy of Constitutional Protection

Lower courts have developed two theories for determining whether tangible property deserves Constitutional protection under the Due Process Clause. The minority correctly explains that the ownership of property is a right protected by the Due Process Clause. The majority of courts, however, have incorrectly used the "entitlement approach" to determine whether a due process claimant has a protectable interest in tangible property.

In the case below, the plaintiff desired to construct a hotel and marina on its property and sought the necessary permits to do so. The court below, following the majority and the 11th Circuit, concentrated its due process property right analysis on whether Yardarm had a vested right in the building permits it was seeking. *Yardarm*, 834 So.2d at 866-7. Without deciding whether Yardarm possessed a vested right, the Florida District Court of Appeal, held that because the permit sought was created by state law, Yardarm had no substantive due process claim. *Id.* at 870.

#### A. The "Entitlement Approach"

##### 1. *Roth* and *Perry*

In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), a state university dismissed a professor after one year of employment. The professor claimed that the university violated his due process rights by punishing him for asserting his right to free speech, and by not providing him with reasons for his dismissal and a hearing to respond. In determining whether the professor had a

property interest in his continued employment, this Court concluded that it is "clear that property interests protected by procedural due process extend *well beyond actual ownership* of real estate, chattels, or money." *Id.* at 571-72 (emphasis added). However, because the professor was asserting that he had a right in his employment, the Court further explained that "to have a property interest in a *benefit*, a person . . . must . . . have a legitimate claim of entitlement to it." *Id.* at 577 (emphasis added).

In a companion case, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), which was based on similar facts, the Court reiterated that one has a property interest in a benefit if "there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit . . . ."

**2. "Entitlement" in Land Use**

Taken together, *Roth* and *Perry* have spawned the "entitlement approach" to determine whether a person has a property right protected by the Constitution. Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation,* 3 Wash. U. J.L. & Pol'y 61, 78 (2000); Kenneth B. Bley, Tina R. Axelrad, *The Search for Constitutionally Protected "Property" In Land-Use Law*, 29 Urb. Law. 251, 265-68 (1997). The "entitlement approach" requires an examination of the claimant's degree of entitlement to whatever property right he is asserting.

In land use cases, the entitlement analysis often translates into the court determining the degree of discretion the regulating body has to deny the owner's development. If the regulating body has discretion to deny development, then no property interest exists. *See, e.g., Macone v.*

*Town of Wakefield*, 277 F.3d 1, 9 (1st Cir. 2002) (providing that because the regulating body had discretion to rescind its approval, the landowner had no property interest); *Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d 494, 504 (2nd Cir. 2001) ("As a general rule 'entitlement turns on whether the issuing authority lacks discretion to deny the permit . . . .'") (citation omitted); *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627, 641-42 (6th Cir. 2001) (*rev'd* on other grounds) (explaining that in matters where the regulating body has discretion to grant or deny a permit, property owners do not have a legitimate claim of entitlement to it, and therefore have no property interest); *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997) ("A claim to entitlement arises . . . when a statute or regulation places substantial limits on the government's exercise of its licensing discretion."); *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1380 (11th Cir. 1994) (providing that a property owner has a right in a permit when the factors for equitable estoppel are present); *George Washington Univ. v. District of Columbia*, 318 F.3d 203, 208-9 (D.C. Cir. 2003) (finding a property interest existed because the regulating body's discretion was substantially limited); *See also Spinell Homes, Inc. v. Municipality of Anchorage*, 2003 WL 21994972, at *8 (Alaska Aug. 22, 2003) (explaining that because the municipality did not have a mandatory duty to issue unconditioned permits and certificates, property owner could not establish that it had a protected property interest); *Tri County Landfill Ass'n, Inc. v. Brule County*, 641 N.W.2d 147, 152 (S.D. 2002) ("in order to demonstrate it held a protected property interest, [landowner] must show that [regulating body] did not have the discretion to deny its permission" to develop).

By focusing on a property owner's degree of entitlement to use his or her property, these courts have ignored the property interest baseline that this Court established in *Roth*: "ownership of real estate, chattels, or money."[1]

### B. Ownership is a Protectable Right

When analyzing whether a due process claimant possesses a protectable property interest, the Third and Seventh Circuits, and some state courts, have correctly focused on the claimant's relationship to the tangible property in question. For example, in *DeBlasio v. Zoning Bd. of Adjustment for West Amwell*, 53 F.3d 592 (3rd Cir. 1995), a landowner brought a substantive due process action claiming that a township's zoning board violated his rights when it denied him a variance. The Third Circuit explained that to have an actionable substantive due process claim, the claimant must possess a property interest worthy of constitutional protection. *Id.* at 598. Ownership, according to the court, "is a property interest worthy of substantive due process protection." *Id.* at 600. Furthermore, the Third Circuit stated that it did not believe that this Court's jurisprudence mandated the use of the entitlement approach. *Id.* at 600 n.9.

The Seventh Circuit has also documented a similar approach. In *River Park, Inc. v. City of Highland*, 23 F.3d 164 (7th Cir. 1994), the plaintiff claimed that the city violated its due process rights by refusing to re-zone its property. In conducting his due process analysis, Judge Easterbrook explained that the plaintiff

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[1] The trial court in this case noted that the rights involved in using one's property "are more fundamental than mere employment interests." *Yardarm Restaurant v. City of Pompano Beach*, No. 87-19652(18) (Fla. Cir. Ct. Feb. 23, 1989).

> surely had a property interest in the land, which it owned in fee simple, and it is therefore entitled to contend that the City's regulation of that land deprived it of property without due process. The references to "property" in the Constitution reflect its Lockean heritage. The founding generation viewed "property" in concrete terms—land and chattels acquired by the investment of effort or purchase from another. An owner may build on its land; that is an ordinary element of a property interest. Zoning classifications are not the measure of the property interest but are legal *restrictions* on the use of property. Licenses, permits and classifications are important to owners because they reflect governmental promises not to interfere with private uses of property, but let us not confuse a decision not to interfere with the property itself.

*Id.* at 166 (citations omitted). *See Polenz v. Parrott*, 883 F.2d 551, 556 (7th Cir. 1989) (explaining that when a landowner challenges a zoning regulation on due process grounds, "the property interest in such a case is apparent—it is the ownership interest in the land itself . . ."); *See also Teer v. State,* 738 N.E.2d 283, 289 (Ind. Ct. App. 2000) (explaining that ownership of a handgun is a "property interest protectible under substantive due process . . ."); *Dale v. Town of Elsmere*, 702 A.2d 1219 (Del. 1997) (providing that ownership of property is worthy of substantive due process protection).

Thus, though these courts acknowledge that a state may regulate the use of property, they correctly focus their property interest analysis on the claimant's relationship to the property in question, not on the restrictions imposed by the state. And these courts have correctly concluded that ownership is a property interest that the Constitution protects.

## II. Disagreement Over the Review of Executive Acts That May Rise to the Level of Substantive Due Process Violations

### A. Most Federal Courts Agree That Executive Acts are Reviewable

A majority of the federal courts of appeal agree that conduct of a government official or non-legislative activity may be egregious enough to be in violation of substantive due process.

For example, in deciding whether the imposition of a five-year eligibility term for parole was a due process violation, the Third Circuit followed this Court in *Foucha v. Louisiana,* 504 U.S. 71 (1992), by holding that

> 'the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them.' *Id.* at 80, (internal quotation omitted).

*Hunterson v. DiSabato* 308 F.3d 236, 248 (3rd Cir. 2002). *See also Miller v. City of Philadelphia*, 174 F.3d 368 (3rd Cir. 2000) (determining that actions taken by a

social worker acting to separate a parent and a child were not arbitrary in the constitutional sense such that substantive due process rights were violated).[2]

In the context of another child abuse administrative action, the Fifth Circuit has dispensed with the property interest analysis in holding that

> a plaintiff whose claim is not susceptible to proper analysis with reference to a specific constitutional right may still state a claim under § 1983 for a violation of his or her Fourteenth Amendment substantive due process right, and have the claim judged by the constitutional standard which governs that right. *Petta v. Rivera,* 143 F.3d 895, 901 (5th Cir.1998). [T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing its power, or employing it as an instrument of oppression. *Collins v. City of Harker Heights, Texas,* 503 U.S. 115, 126, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (quotation omitted).

*Morris v. Dearborne,* 181 F.3d 657, 668 (5th Cir. 1999) (internal quotations omitted)

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[2] In fact the Third Circuit goes so far as to point out that non-legislative government deprivation that comports with procedural due process still might give rise to a substantive due process claim upon allegations that the government deliberately and arbitrarily abused its power. *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 139 (3rd Cir. 2000).

The Sixth and Second Circuits are equally clear that the substantive due process right to be free of arbitrary and capricious action by government actors may be violated by executive or administrative action. *See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001) (*rev'd* on other grounds) (reviewing denial of a site plan for arbitrary executive action); *Bowers v. City of Flint*, 325 F.3d 758 (6th Cir. 2003) (finding that the property right in a discounted water bill was not appropriate for a substantive due process claim, but that executive actions related to certain property rights may be egregious enough for due process review); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (determining the standard for reviewing action by school officials).

To take the analysis one step further, many courts draw a distinction between legislative and executive actions when determining whether the government action is fatally arbitrary. The Fourth Circuit agrees that executive actions are reviewable, and in its analysis encouraged courts to "look to history for whatever it may reveal about traditional executive practices and judicial responses in comparable situations by way of establishing context for assessing the conduct at issue." *Hawkins v. Freeman*, 195 F.3d 732, 738 n.1 (4th Cir. 1999). In applying standards of review, the Eighth Circuit has held that abusive executive action may include shocking conduct, conduct intended to injure that is unjustified by any government interest, or conduct that shows a "deliberate indifference" to protected rights. *Putnam v. Keller*, 332 F.3d 541 (8th Cir. 2003). Regardless of the standards utilized, the courts do review executive acts for substantive due process violations by some criteria.

It is no surprise that these courts agree on executive actions in this context. The foundation for this argument is this Court's holding that

> While due process protection in the substantive sense limits what government may do in both its legislative and its executive capacities, criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of governmental officer that is at issue.

*County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citations omitted). This Court intended for due process rights to be protected and for courts to review government actions that may abuse those rights.

### B. The 11th Circuit and Florida Courts are Drawing an Improper Conclusion About Executive Activity

The *Yardarm* case punctuates the mistaken application of federal due process law in Florida. The appeals court held that the "substantive due process claim fails as a matter of law, because no evidence was presented that the acts were done in a legislative, rather than an executive capacity." *Yardarm*, 834 So.2d at 869.

The court relies on precedent from the 11th Circuit, which follows a line of reasoning that deprivation of rights must be focused on the general population and not a small group of individuals. Therefore, a non-legislative deprivation of rights could never result in a successful substantive due process claim. This line of 11th Circuit and Florida cases is wrong for two reasons – not only does

it mischaracterize the property interest, as discussed *supra*, but it also improperly excludes executive actions.

In *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), the court relies on *Greenholtz v. Inmates of Neb. .Penal & Correctional Complex*, 442 U.S. 1 (1979) as its basis for artificially distinguishing between legislative and non-legislative acts. While *Greenholtz* deals with the concept of entitlement in the context of the right to parole of a convicted person, the 11th Circuit in 1994 simply misconstrued the case to find an intention of this Court to preclude review of *any* executive actions. As stated previously, this concept has been clarified in the *Lewis* case, and in subsequent examinations of this issue by federal courts. However, the *Yardarm* court relies heavily on *McKinney*, to conclude that administrative actions are not reviewable, and on *Reserve v. Town of Longboat Key*, 933 F.Supp. 1040 (M.D.Fla. 1996), to find that the actions in the *Yardarm* situation are purely executive in nature.

A substantive due process claim under 42 U.S.C. § 1983 may be dependent on the degree of conduct but not the number of people affected. Such a contention is beyond the bounds of credibility in a constitutional sense. Due process violations of any kind may affect the rights of one person. *Cf. Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000) (holding that equal protection claims may be brought by a "class of one"). Clearly, the framers of the U.S. Constitution and the judicial system did not intend to protect liberties of only large groups of people.

## CONCLUSION

The U.S. Constitution does not allow a state to deprive a citizen of his property without due process of law. Many courts are depriving landowners of their due process rights by finding that they have no right to use their property. Nevertheless, some courts have correctly acknowledged that property ownership is a right protected by the Constitution.

Once a property interest is established it is necessary for a court to review the government's action to determine whether it gives rise to a due process violation. The nature of the action, as administrative instead of legislative, may affect the standard imposed but should not preclude judicial review altogether.

This Court should grant certiorari in this matter to make clear that ownership of property is an interest protected by the U.S. Constitution. In addition, the Court should grant certiorari to clarify for the Florida courts that federal constitutional rights may be violated by executive actions of state or local governments.

DATED: November 7, 2003

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MOTION FILED

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No. 03-531

In the

# Supreme Court of the United States

YARDARM RESTAURANT, INC.,

*Petitioner,*

v.

THE CITY OF POMPANO BEACH,

*Respondent.*

**On Petition for Writ of Certiorari to the District Court of Appeal of Florida for the Fourth District**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), Pacific Legal Foundation (PLF) respectfully requests leave of the Court to file this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent for participation in this case was granted by counsel of record for Petitioner. Consent was withheld by Respondent City of Pompano Beach.

## INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is the largest and most experienced nonprofit, public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Coral Gables, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF attorneys have appeared before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Recently, PLF attorneys presented this Court with arguments regarding how the Constitution and this Court's precedents establish that the ownership of land is a property right protected by due process. *See City of Cuyahoga Falls v. Buckeye*

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[1] Pursuant to Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

*Community Hope Foundation*, 538 U.S. 188, 123 S. Ct. 1389 (2003). PLF's concerns extend to a governmental entity's abuse of the constitutional rights of its citizens and disregard for the substantive due process and property rights due to all citizens of the United States. Amicus's interest in the outcome of this lawsuit is directly tied to its members' private property rights and its members' right to be treated fairly and equitably by our governing institutions.

For all the foregoing reasons, the motion of Pacific Legal Foundation to file a brief amicus curiae should be granted.

DATED: November, 2003.

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## QUESTIONS PRESENTED

1. In determining whether there is a denial of substantive due process of law by a local government, does it make any difference whether the property rights that were violated arose directly from the Constitution or were created by state law?

2. Must Florida comply with this Court's repeated holding that a regulatory taking of private property occurs when government action fails to substantially advance a legitimate state interest?

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

INTRODUCTION ..... 1

SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 3

I. YARDARM HAD A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT TO MAKE REASONABLE USE OF ITS LAND, WHICH REQUIRED THE FLORIDA COURTS TO PERFORM A SUBSTANTIVE DUE PROCESS REVIEW OF THE CLAIMS ..... 3

II. FLORIDA TAKINGS LAW IS IN CONFLICT WITH THE LAW OF THIS COURT AND OTHER STATE COURTS AND HAS RESULTED IN A DENIAL OF CONSTITUTIONAL RIGHTS TO THE CITIZENS OF FLORIDA ..... 8

CONCLUSION ..... 12

## TABLE OF AUTHORITIES

Page

### Cases

*Agins v. City of Tiburon*, 447 U.S. 255 (1980) ..... 2, 7-8

*Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068 (8th Cir. 1997) ..... 5

*Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) ..... 3-4, 5

*City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 123 S. Ct. 1389 (2003) .... 3

*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) ..... 8

*City of Pompano Beach v. Yardarm Restaurant*, 834 So. 2d 861 (Fla. Dist. Ct. App. 2002) ..... 8-9

*DeBlasio v. Zoning Board of Adjustment for Township of West Anwell*, 53 F.3d 592 (3d Cir. 1995) ..... 4

*Department of Transportation v. Weisenfeld*, 617 So. 2d 1071 (Fla. Dist. Ct. App. 1993) ..... 9

*Dolan v. City of Tigard*, 512 U.S. 374 (1994) ..... 8

*Estate of Friedman v. Pierce County*, 768 P.2d 462 (Wash. 1989) ..... 10

*Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992) ..... 5

*George Washington Univ. v. District of Columbia*, 318 F.3d 203 (D.C. Cir. 2003) ..... 5

*Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) ..... 8

**TABLE OF AUTHORITIES—Continued**

**Page**

*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) ..... 8

*McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995)..... 1

*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) ..... 6, 8

*OMYA, Inc. v. Town of Middlebury*, 758 A.2d 777 (Vt. 2000) ..... 10

*Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd.*, 582 So. 2d 790 (Fla. Dist. Ct. App.), *review denied*, 591 So. 2d 183 (Fla. 1991) ..... 10

*Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) ..... 7

*Perry v. Sindermann*, 408 U.S. 593 (1972) ..... 4-5

*River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994) ..... 4, 7

*RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911 (2d Cir. 1989) ..... 5

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*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) ..... 8

*Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994) ..... 9-10

*Triomphe Investors v. City of Northwood*, 49 F.3d 198 (6th Cir. 1995) ..... 5

**TABLE OF AUTHORITIES—Continued**

**Page**

*United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003) ..... 4

*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ..... 8

*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) ..... 4

*Washington ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) ..... 6

*Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627 (1829) ..... 6-7

*Yee v. City of Escondido*, 503 U.S. 519 (1992) ..... 8

**Constitution**

U.S. CONST. amend. V ..... 1

U.S. CONST. amend. XIV ..... 6

**Miscellaneous**

Reich, Charles, *The New Property*, 73 Yale L.J. 733 (1964) ..... 5

Mandelker, Daniel R., *New Property Rights Under the Taking Clause*, 81 Marq. L. Rev. 9 (1997) ..... 5

## INTRODUCTION

The Florida courts are denying the citizens of Florida the constitutional property rights afforded to all of the citizens of this country under the Fifth Amendment to the United States Constitution.[1] Yardarm Restaurant (Petitioner) was driven out of business because of the hostile actions of the City of Pompano Beach (Respondent) (Petition for a Writ of Certiorari at 4). Respondent's abuse of Petitioner's substantive due process and basic constitutional property rights have gone without recourse, however, because the Florida courts have chosen to disregard the law as handed down by this Court, even when those state cases required an application of federal law.

## SUMMARY OF ARGUMENT

This Court and several lower federal courts have held that due process protection attaches to property ownership because landowners have a constitutionally protected interest in using their property. Some courts, however, require that an additional "entitlement" to a particular use of property be established before considering a due process claim. These courts, which include the Eleventh Circuit Court,[2] fail to recognize a very important distinction—circumstances where due process rights attach because a real property interest is involved are different than circumstances where the underlying rights arise out of governmental benefits, where there is no inherent right to the benefit in the first place. The court below in this case followed the unfortunate precedent set by the Eleventh Circuit on the issue of "entitlement," instead of following the holdings of this

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[1] The Takings Clause of the Fifth Amendment of the United States Constitution provides: "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

[2] *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), *cert. denied, sub nom. McKinney v. Osceola County Bd. Of County Comm'rs*, 513 U.S. 1110 (1995)

Court and several other federal courts. There is a rift developing between the federal courts of this nation in their interpretations of due process protection, and that confusion is filtering down to the lower state courts. The result is a body of law that is confused and conflicted. The Court must hold that when traditional property rights identified in the Due Process Clause are at issue, there can be no "entitlement" requirement for due process protections to attach. Some courts have understood this, but unfortunately others have not. This case cleanly presents the issue for this Court to resolve the conflict in the state and lower federal courts.

The denial of property rights to the citizens of Florida is also evident in the decisions handed down by the Florida Courts of Appeal, as well as the Florida Supreme Court, all of which refuse to recognize the significance of the word "or" in the takings test announced by this Court in *Agins v. City of Tiburon*[3] and subsequent cases. Instead, they have continued to misapply that test by holding that a regulatory act that fails to substantially advance a legitimate government interest cannot be a taking unless it also simultaneously denies economically viable use. This repeated holding of the Florida courts goes against a clear interpretation set forth by this Court of the *Agins* takings test, which states that **either** the first prong of the test, substantial advancement, **or** the second prong, denial of economically viable use, must be met for a taking to occur. The Petitioner in this case was denied its federal Takings Clause claim because the Florida courts, including the court below, refuse to correctly apply the disjunctive *Agins* test as repeatedly upheld by this Court. The Court must decide this case because it is the latest and most egregious in a long line of Florida cases.

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[3] 447 U.S. 255 (1980).

## ARGUMENT

### I

### YARDARM HAD A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT TO MAKE REASONABLE USE OF ITS LAND, WHICH REQUIRED THE FLORIDA COURTS TO PERFORM A SUBSTANTIVE DUE PROCESS REVIEW OF THE CLAIMS

Yardarm argues that the City's actions violated its substantive due process rights under the Due Process Clause, and challenges the position taken by Florida courts that constitutionally protected property rights receive due process protection only if the owner also has a vested right to develop the property. Because the Due Process Clause guards against arbitrary decisions by any government entity that interfere with fundamental constitutional guarantees against deprivations of life, liberty, or property, it does not matter whether an owner has a vested right to use the property in a particular manner. The protections of the Due Process Clause attach not only after a landowner has obtained a vested use right, but also whenever government acts in a manner violative of the Due Process Clause *prior* to the culmination of any vesting process. Otherwise, landowners on their way to obtaining a vested right can be arbitrarily stripped of their right to use property without recourse. Since Petitioner had an ownership interest in the property involved in the litigation, it had a right to make use of the property—a right protected by the Due Process Clause.

A constitutionally protected property interest is an essential element of a claim for violation of due process rights. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (1972); *see also City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 123 S. Ct. 1389, 1396 (2003) (considering, but not finding it necessary to decide whether respondents possessed a property interest in the timely issuance of a building permit). Some courts have held that property

ownership alone is sufficient to meet the "property interest" prong of the due process constitutional analysis. "[O]ne would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership." *DeBlasio v. Zoning Board of Adjustment for Township of West Anwell*, 53 F.3d 592, 601 (3d Cir. 1995) (overruled on other grounds by *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (due process protection attaches to property ownership because landowners have a constitutionally protected interest in using their property); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994); (*DeBlasio* "is only controlling as a land-use regulation case that established a fundamental property interest protected by substantive due process where a governmental decision restricts or regulates a landowner's use and enjoyment of his/her property.").

In *Roth*, this Court looked to whether Roth had a "legitimate claim of entitlement" to a nontenured teaching position at a state-run institution, and considered whether to broaden the class of claims that come under due process protection. *Roth*, 408 U.S. at 577. Thus, in *Roth*, this Court was concerned with public benefits ("new property") and not with traditional forms of property. *Roth* also states that property rights are not created by the Constitution, but are created and defined by an independent source, such as state law. 408 U.S. at 577.

In *Roth* and its companion case *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), this Court expanded due process protection to cover more than the traditional forms of property (e.g., ownership of real estate, chattels, or money). This Court recognized other, new forms of protected property, arising from public benefits created by a state. *Roth*, 408 U.S. at 571-72 ("The Court has also made clear that the property interests protected by procedural due process extend well beyond actual

ownership of real estate, chattels, or money."); *Perry*, 408 U.S. 593 at 601 (" '[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms."). *Perry*, 408 U.S. 593 at 601. *See also* Daniel R. Mandelker, *New Property Rights Under the Taking Clause*, 81 Marq. L. Rev. 9 (1997); Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964) (advocates for a theory of recognition and protection of new property rights). Thus, this Court has repeatedly reviewed due process claims without requiring the owner to first perfect a statutory entitlement. *Roth* also affirmed the fundamental principle that ownership of property is sufficient to establish a substantive due process claim. *Roth*, 408 U.S. at 571-72. Unfortunately, many circuits have begun to misapply the "entitlement approach" enunciated in *Roth* and have read *Roth* to require a "legitimate claim of entitlement" to a particular use of property. *See, e.g.*, *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63, 68-69 (4th Cir. 1992); *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202-03 (6th Cir. 1995); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989). In other words, because *Roth* required entitlement or vesting of the new property right for due process to attach, these courts mistakenly demand that owners of *real* property have some type of a vested development entitlement before they can assert a due process claim. Those courts, like the Florida court in this case, do not look to ownership of property standing alone as being an adequate interest for due process to apply, but have instead "focused on the structure of the land-use regulatory process . . . looking to the degree of discretion to be exercised by state officials in granting or withholding the relevant permission." *George Washington Univ. v. District of Columbia*, 318 F.3d 203, 207 (D.C. Cir. 2003) (citation omitted). These courts want to see that the landowner has an entitlement to a permit before they will entertain the question of whether the denial of a permit application might implicate the

Due Process Clause. *Roth* and *Perry* establish an "entitlement approach" that properly is applied to cases seeking a property interest in valuable government benefits. The "entitlement approach" has no application when a court is asked to decide whether land use decisions involve illegitimate government action. Thus, it cannot not guide the analysis regarding the appropriate fundamental interest that merits due process protection when the interest in question flows from property ownership. The court below made an error of constitutional magnitude by enlisting that incorrect approach.

Unlike a professor seeking continued employment, property owners such as Petitioner are not claiming the right to a government-established benefit when seeking to make use of their property. *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987) ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.' "). Any analysis that implicitly or explicitly requires an "additional interest" or entitlement beyond property ownership to establish a due process claim goes contrary to this Court's expansion of the definition of property interest in *Roth*. It also results in the denial of due process protection for the property interests specifically mentioned in the Due Process Clause of the United States Constitution as entitled to protection. U.S. CONST. amend. XIV.

One of the defining essential rights included in property ownership is the right of the owner to use his land. *See Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (In deciding a due process challenge a land use regulation the Court held: "The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution."). As early as 1829 this Court stressed "the right of the citizens to the free enjoyment of their property lawfully acquired." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627,

657-58 (1829). Similarly, Judge Easterbrook, writing for the Seventh Circuit Court in *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir. 1994), explained that, while land use regulations may put legal restrictions on the use of the property, the property owner retains a constitutionally protected interest in being able to use his property. *Id.* at 166. Otherwise a single local ordinance providing that "'we may put your land in any zone we want, for any reason we like' would abolish all property rights in land overnight. The due process clause... [is] made of sterner stuff." *River Park, Inc. v. City of Highland Park*, 23 F.3d at 166. And while a government may seek to restrict the right of the owner to use property in a particular way, the regulatory process must not be confused with the property interest at stake. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

In this case, Petitioner has a constitutionally protected property interest that gives rise to Due Process Clause protections, solidly anchored in Petitioner's ownership of the property at issue in the lawsuit. This property is, in and of itself, a protected property interest that allows Yardarm to challenge arbitrary and capricious government actions connected with the regulatory process. This Court should grant the petition to ensure that the Due Process Clause is in place to protect property owners from the arbitrary actions of any governmental entity, and that ownership in property is a sufficient interest meriting Due Process Clause protections.

## II

## FLORIDA TAKINGS LAW IS IN CONFLICT WITH THE LAW OF THIS COURT AND OTHER STATE COURTS AND HAS RESULTED IN A DENIAL OF CONSTITUTIONAL RIGHTS TO CITIZENS OF FLORIDA

In the years since this Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255, the "two-pronged takings test"

enunciated by the Court has been repeatedly cited and accepted as the law of the land with regard to regulatory takings. As this Court held in *Agins*, "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260 (citations omitted). Since this Court handed down the *Agins* decision, it has, on several occasions, reiterated the two-pronged takings test in cases involving a wide variety of both facial and as-applied challenges to legislative enactments and regulatory actions. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 333-34 (2002); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commission*, 483 U.S. at 834; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985). Not only has this Court reiterated the *Agins* takings test on numerous occasions, but it has consistently held that satisfaction of the first of the prongs, failure to substantially advance a legitimate state interest, will give rise to a taking. *See id.*

Florida has ignored this Court's clear interpretation of the takings law and, in the process, has denied essential property rights to its citizens, including this Petitioner.

In this case, the court below *twice* held that a taking had not occurred in Yardarm's case, despite citing to the trial court's findings that "the City engaged in unreasonable, protracted litigation; repeatedly ignored court orders . . . ; and engaged in stonewalling tactics to block the Yardarm project." *City of Pompano Beach v. Yardarm Restaurant*, 834 So. 2d 861, 868 (Fla. Dist. Ct. App. 2002). The testimony of a city

commissioner clearly states that these commissioners had an " 'unstated policy to kill the Yardarm project.' " *Id.* at 869. Despite the largely uncontested evidence that the actions of the City were not for the purpose of advancing a legitimate state interest, but were instead geared towards satisfying a few influential individuals who wanted to exert their control over the Yardarm project, the Florida Court of Appeal found no taking under the Florida Constitution. *Id.* at 865. It based its holding on the erroneous premise that in addition to a regulatory act's failure to substantially advance a legitimate governmental interest, it must also simultaneously deny economically viable use for there to be a taking. *Id.* at 865.

After denying relief of the takings claim under Florida state law, the court below made a second, more egregious error. It went on to hold that the state and federal takings claims of the Petitioner were 'identical" and, as such, the federal claim should similarly fail under the United States Constitution. *Id.* at 865. Not only was this an incorrect application of federal law in light of *Agins* and other decisions by this Court, but in holding that the federal takings claim was precluded by the doctrine of res judicata, *id.* at 865, the court incorrectly asserted that the elements of a takings claim are identical under Florida and federal law. In fact, the two claims are anything but identical, and the Florida courts' treatment as such has resulted in a serious misapplication of federal law.

Unfortunately, the departure of the court below from the opinions of this and other courts is not an aberration of this case; it is a consistent theme in Florida case law. *See, e.g.*, *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So. 2d 54, 58 (Fla. 1994); *Department of Transportation v. Weisenfeld*, 617 So. 2d 1071, 1072-73 (Fla. Dist. Ct. App. 1993). Notwithstanding this Court's clear explanation of the disjunctive nature of the *Agins* test, the Florida courts have failed to take heed, taking the position instead that the second prong, a denial of economically viable

use of the land, must be met in every case before a taking can occur. *Tampa-Hillsborough County Expressway Authority*, 640 So. 2d at 58. In *Tampa-Hillsborough*, a case where a regulation was found not to advance a legitimate state interest, the court held that "[a] taking occurs where regulation denies substantially all economically beneficial or productive use of land." *Id.* This ruling deprived Florida property owners of the ability to assert a takings claim solely on the basis that the regulation failed to substantially advance a legitimate state interest. In the same opinion, the Florida Supreme Court acknowledged and disapproved of the lower court's holding in *Orlando/Orange County Expressway Authority v. W & F Agrigrowth-Fernfield, Ltd.*, 582 So. 2d 790 (Fla. Dist. Ct. App.), *review denied*, 591 So. 2d 183 (Fla. 1991). In that case, the Florida Court of Appeal reiterated this Court's holding in *Agins* when it held "[a] regulation effects a taking if it does not substantially advance a legitimate state interest *or* if the regulation denies an owner economically viable use of his land." *Id.* at 792. In disapproving of this decision, the Florida Supreme Court not only failed to cite *Agins* or acknowledge the significance of the disjunctive *Agins* takings test at all, but it rejected the one decision that did cite to that test.

On the other hand, several state courts other than Florida have recognized that where takings claims are made, this Court's *Agins* test applies, and has a disjunctive quality which provides that the satisfaction of either prong will effect a taking. *See, e.g., State ex rel. Shemo v. City of Mayfield Heights*, 765 N.E.2d 345, 350-51 (Ohio 2002) (stating explicitly that the *Agins* test is disjunctive when applied to situations where a takings claim is made); *OMYA, Inc. v. Town of Middlebury*, 758 A.2d 777, 780 (Vt. 2000) (using the *Agins* test as a disjunction); *Estate of Friedman v. Pierce County*, 768 P.2d 462, 467 (Wash. 1989) (approving the *Agins* rule in its disjunctive form). In *Shemo*, the Ohio Supreme Court, in applying the *Agins* test, found a taking where the owners of a piece of property

demonstrated that the city's zoning of that property as residential did not substantially advance a legitimate state interest. *Shemo*, 765 N.E.2d at 351-52. The breadth of case law handed down by the high courts of several other states has overwhelmingly supported the disjunctive quality of the *Agins* test and the interpretation that a taking will occur with satisfaction of the failure to substantially advance prong standing alone.

The Takings Clause extends to the states as well as the federal government. Unfortunately, the Florida courts have made quite clear in recent decisions, including the court below in the instant case, and the Florida Supreme Court in *Tampa-Hillsborough*, that Florida citizens are not afforded the same protection of property rights under the United States Constitution as the citizens of other states. It is up to this Court to rectify the situation in Florida and restore the property rights of its citizens by reiterating the disjunctive nature of the *Agins* takings test, the significance of the first prong of that test—substantial advancement of a legitimate state interest—and the correct application of this test to a federal takings claim. The Florida courts cannot be allowed to continually misapply federal law, to the detriment of its citizens.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: November, 2003.

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MOTION FILED
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No. 03-531

IN THE
# Supreme Court of the United States

YARDARM RESTAURANT, INC.,

*Petitioner*,

*v.*

THE CITY OF POMPANO BEACH,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS OF FLORIDA, FOURTH DISTRICT

## MOTION OF SUGAR CANE GROWERS COOPERATIVE OF FLORIDA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Sugar Cane Growers Cooperative of Florida hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for Petitioner has been obtained. The consent of the attorney for Respondent was requested but refused.

As more fully explained at pages 1-3 of the attached brief under "Interest of *Amicus Curiae*," the interest of Sugar Cane Growers Cooperative of Florida in this case arises from the fact the Cooperative and its members are property owners in Palm Beach County that is adjacent to Broward County and is served by the same Florida District Court of Appeals that rendered the decision below. Accordingly, they will be substantially affected by that court's ruling.

Respectfully submitted,

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## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Table of Cited Authorities | ii |
| Interest of *Amicus Curiae* | 1 |
| Introduction | 3 |
| Summary of the Argument | 5 |
| Reasons for Granting the Petition | 6 |
| I. This Case Is Both A Regulatory Taking And A Deprivation Of Substantive Due Process. | 6 |
| II. The Constitution Recognizes No Dichotomy Between Property Interests And Other Liberty Interests. Nor Does It Recognize Any Less Of A Due Process Violation When The Deprivation Occurs Because Of An Executive Rather Than A Legislative Act. | 8 |
| Conclusion | 11 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Agins v. City of Triburon*,
477 U.S. 225(1980) ..... 7

*City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999) ..... 6, 7

*City of Pompano Beach v. Yardarm Restaurant, Inc.*, 834 So. 2d 861 (Fla. App. 2002) .....1, 4, 7, 10

*Collins v. City of Harper Heights, Texas*,
503 U.S. 115 (1992) ..... 10

*Ex Parte Virginia*, 100 U.S. 339 (1879) ..... 9

*Lynch v. Household Finance Corporation*,
405 U.S. 538 (1972) ..... 8

*McKinney v. Pate*, 20 F.3d (11th Cir. 1994) .....4, 9, 10

*Monnell v. Department of Social Services of City of New York*,
436 U.S. 658 (1978) ..... 10

*Reserve Limited v. Town of Longboat Key*,
933 F. Supp. 104 (M.D. Fla. 1996) ..... 8

*Reserve Limited v. Town of Longboat Key*,
17 F.3d 1374 (11th Cir. 1994) ..... 9

*Shelley v. Kraemer*, 334 U.S. 1 (1948) ..... 8

*Cited Authorities*

*Page*

**United States Constitution:**

Fourteenth Amendment ..... 5, 11

**Statutes:**

42 U.S.C. § 1983 .....6, 9, 10, 11

Florida Statute § 373.129(5) ..... 2

Florida Statute § 373.4592(1)(h) ..... 1

**Public Laws:**

Water Resources Development Act of 2000, Pub.L. No. 106-541, § 601(b)(2) and § 602(a), 114 Stat. 2681-83 and 2693 ..... 2

**Regulations:**

Chapter 40E-63, Fla. Admin. Code ..... 2

## INTEREST OF *AMICUS CURIAE*

*Amicus Curiae*, Sugar Cane Growers Cooperative of Florida ("SCGC") submits this brief in support of the Petition for Writ of Certiorari presented by Yardarm Restaurants, Inc. seeking review of the decision of Florida's Fourth District Court of Appeals in the case of *City of Pompano Beach v. Yardarm Restaurant, Inc.*, reported at 834 So. 2d 861 (Fla. App. 2002) (Yardarm II).[1]

Sugar Cane Growers Cooperative of Florida is a cooperative agricultural marketing association formed under Chapter 618 Florida Statutes. It is owned by 54 farmer-members who grow sugarcane on approximately 74,000 acres of land in Palm Beach County, Florida. The primary functions of the Cooperative are to harvest, process the sugarcane and market the raw sugar. This land lies within the boundaries of the Congressionally designated Everglades Agricultural Area (EAA). Stormwater from EAA farms drains, in part, to the Everglades ecosystem that is the largest subtropical wetland in North America. For this reason, EAA farmers have been subjected to extraordinary scrutiny and government regulation of their farming practices. It is also noteworthy that the 1994 Everglades Forever Act requires the construction of the Everglades Construction Project which includes 42,000 acres of stormwater treatment areas all within the boundaries of the EAA. The legislature found that this project "represents by far the largest environmental cleanup program of this type ever undertaken." § 373.4592(1)(h) Florida Statutes. Overlaying this ambitious and now mostly

1. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the SCGC, made a monetary contribution specifically for the preparation or submission of this brief.

completed environmental restoration project is the Comprehensive Everglades Restoration Plan (CERP) authorized by Congress as part of the Water Resources Development Act of 2000 (WRDA 2000), Pub. L. No. 106-541, § 602(a), 114 Stat. 2693. To achieve CERP's goals, Congress authorized more than $1 billion in initial projects which include a large water storage reservoir within the EAA. *See, e.g.*, § 601(b)(2), 114 Stat. 2681-2683. Farmland within the EAA is coveted for environmental restoration purposes. Those, in government who are interested in obtaining EAA lands for environmental restoration purposes have a built-in incentive to keep land prices low by preventing non-agricultural development of EAA farmland; or by making farming uneconomical through regulation so they can acquire the land for next to nothing.

The Cooperative and its members have a direct stake in the outcome of this case. The Cooperative and its farmer members own and lease significant amounts of land. These farmers are subject to numerous laws, regulations, ordinances and associated permits such as the land use regulations and permits involved in this case. The Cooperative and its members cannot farm their land unless they have consumptive use and surface water management permits issued by the South Florida Water Management District ("District") and enforced by executive and management personnel on behalf of the District. Farmers who violate any conditions of these permits are subject to a range of criminal and civil enforcement actions that include civil fines of up to $10,000 per day. § 373.129(5) Florida Statutes. Chapter 40E-63, Florida Administrative Code, imposes the most stringent Agricultural Best Management Practices (BMPS) regulations in the country. Farmers must have an approved BMP plan in place and must measure every

drop of water and every ounce of phosphorus leaving their farms. Farmers must demonstrate that the BMP plan actually achieves verifiable phosphorus reduction requirements under the rule. Farms are subject to inspections and audits by staff of the District and are subject to the same criminal and civil enforcement actions listed above. These farmers cannot farm unless they have permits that are fairly enforced by the executives and managers acting on behalf of the District. They cannot make non-agricultural uses of their lands unless they have building and development permits issued by local, county and state governments upon which they can rely before beginning development. Amicus, therefore, has a vital interest in assuring that the Takings Clause is interpreted fairly. It is imperative that rights in real property, along with the necessary permits these farmers must have to make any economic use of their lands are recognized as being fundamental rights that deserve substantive due process protection. And these fundamental rights are of no value if government officials acting under color of law are permitted to deprive citizens of their constitutional rights when these objectives are accomplished through executive instead of legislative action.

## INTRODUCTION

This case is a classic example of why it is necessary to provide substantive as well as procedural due process protections in a permitting context for owners of real property. The property owner in this case won time and time again before four Florida circuit court judges, made multiple trips to the Florida Court of Appeals and still was effectively blocked from building on its property and ended up losing the property in foreclosure. The trial court found that the City, acting through its highest officials—its Mayor, City

Manager, City Attorney and Chief Building Official—"engaged in unreasonable, protracted litigation; repeatedly ignored court orders to apply the February 14, 1974 regulations to Yardarm's permit applications; and engaged in stonewalling tactics to block the Yardarm project." *City of Pompano Beach v. Yardarm Restaurant, Inc.* 834 So. 2d 861, at 868 (Fla. App. 2002). The appellate court found, rather inexplicably given these facts, that Yardarm had not been deprived of substantially all use of its property. But what is most remarkable about this case is the finding of the appellate court that the developer had no substantive due process claim because the property interest the landowner possessed was created by state law, not the United States Constitution, and that the any deprivation of the property owner's rights was done by executive and not legislative acts of the City. This doctrine was expounded in *McKinney v. Pate*, 20 F.3d (11th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 1110 (1995), an employment termination case, in which the court held that "In short, areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because 'substantive due process rights' are created only by the Constitution.'" *See, e.g., id.*, at 1556. *McKinney* has since been applied in the case below and in many other state and federal courts within the Eleventh Circuit to a broad array of cases involving rights in real property. This brings the law in that circuit into clear conflict with the takings and substantive due process jurisprudence of this Court and of all the other federal courts of appeal.

## SUMMARY OF THE ARGUMENT

The decision below treats a substantive due process deprivation claim as being one and the same as a taking. The action of the City, which should be characterized as a violation of substantive due process resulting in a taking, is instead characterized as merely an alleged violation of substantive due process. The court below considers rights in real property less worthy of protection than other fundamental liberties guaranteed in the Constitution. Even that limited substantive due process remedy is taken away from the landowner because the deprivation occurred by means of executive and not legislative actions by the City. The notion that rights in real property are less worthy of protection than other fundamental rights guaranteed by the Constitution has no foundation in the history of the laws implementing the Fourteenth Amendment or in the decisions of this Court. And the notion that there is no remedy when a government actor takes away rights by executive as opposed to legislative action is a modern invention by one Circuit Court of Appeals which instructs and invites government actors to find new and creative ways to obstruct lawful agricultural and commercial uses of real property and, in extreme cases like this one, to obtain private property for public use without just compensation.

If permitted to stand, the opinion below will seriously erode the constitutional protection for real property rights of *Amicus Curiae* and other real property owners in Florida who must have permits on which they can rely before they can put their properties to productive economic uses. And if permits are issued and enforced by executives and officers acting on behalf of government in ways not bearing a substantial relationship to a legitimate public purpose, then property owners must have available a remedy that prevents an unlawful deprivation of their constitutional rights. The decision in the case below robs landowners in Florida of that remedy.

## REASONS FOR GRANTING THE PETITION

### I. This Case Is Both A Regulatory Taking And A Deprivation Of Substantive Due Process.

Of all previous taking and substantive due process cases that have been heard by this Court, the facts in this case most closely parallel those in *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999). There, as here, the property owner brought an action under 42 U.S.C. § 1983 claiming both a taking and a violation of substantive due process. "After five years, five formal decisions, and 19 different site plans [records citations omitted], Del Monte Dunes decided the city would not permit development of the property under any circumstances." *See, e.g., id.*, at 698. The District Court charged the jury, properly so according to this Court, to find for Del Monte Dunes if it had been denied all economically viable use of its property or that the regulation did not substantially advance a legitimate public purpose. The jury was further instructed that "The regulatory actions of the city or any agency substantially advanc[e] a legitimate public purpose if the action bears a reasonable relationship to that objective." *See, e.g., id.*, at 701. The jury delivered a general verdict for Del Monte Dunes on its taking and equal protection claims. In affirming this verdict, this Court found that "The jury, furthermore, was not asked to evaluate the city's decision in isolation but rather in context, and, in particular, in light of the tortuous and protracted history of attempts to develop the property." *See, e.g., id.*, at 706. The question submitted to the jury was whether "the city's particular decision to deny Del Monte Dunes' final development authority was reasonably related to the city's proffered justification.'" *See, e.g., id.*, at 706.

There are great factual similarities between *Del Monte Dunes* and the case below. Both developers were ultimately denied any right to develop their properties and both properties ultimately ended up in public ownership. Liability was determined by the jury in *Del Monte Dunes*. The case below was bifurcated with the Florida Circuit judge finding liability and the jury determining damages. Del Monte Dunes ultimately sold its property to the city at far less than market value. Yardarm lost its property in foreclosure. The most striking differences are that Del Monte Dunes initially recovered some of its investment and the wrongs done to it by the City were remedied by a damage award.

The difference between these cases is that *Del Monte Dunes* was decided in accordance with the long history of the takings jurisprudence of this Court while *Yardarm* was not. This Court in *Del Monte Dunes* applied both parts of the *Agins* test. "The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citations omitted], or denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 477 U.S. 255, 260 (1980). The case below ignores the first part of the *Agins* test. Clearly, the City of Pompano Beach denied Yardarm the right to build its already permitted hotel tower so that adjoining property owners could enjoy an unobstructed view of the lighthouse, the Hillsboro Inlet and the Atlantic Ocean. The City's action in this case does not advance a legitimate state interest.

The case below illustrates why it is necessary to extend substantive as well as procedural due process protection to rights in real property. The Yardarm property owners received many years of procedural due process in the Florida courts but none of these procedural protections could save the

property from the determined and unconstitutional efforts of the city to prevent any development of the property. It is not surprising that these procedural measures provided no remedy given the fact that the Eleventh Circuit and Florida courts regard rights in real property as second class constitutional rights.

## II. The Constitution Recognizes No Dichotomy Between Property Interests And Other Liberty Interests. Nor Does It Recognize Any Less Of A Due Process Violation When The Deprivation Occurs Because Of An Executive Rather Than A Legislative Act.

In his opinion for the majority in *Lynch v. Household Finance Corporation*, 405 U.S. 538 (1972), Justice Stewart expressly rejected the notion that property rights are entitled to less protection than other personal liberty interests. He wrote that ". . . the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." *See, e.g., id.*, at 552.. His opinion quotes *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948) which says "Equality in the enjoyment of property rights was regarded by the framers of the amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the amendment was intended to guarantee."

The court below quotes with approval the decision in *Reserve Limited v. Town of Longboat Key*, 933 F. Supp. 1040, 1043-44 (M.D. Fla. 1996) which said "First, the purported property interest (i.e. Reserve's interest in the revoked building permit) is created by state law and falls comfortably short of a fundamental right both grounded in the Constitution and 'implicit in the concept of ordered liberty.'" The second cited factor is that the permits were issued by the City's town

manager and public works director, both of whom perform executive rather than legislative functions, and the actions of each of these officials effect only a small group of individuals and not the general population. But surely, 42 U.S.C. § 1983 was intended to protect property rights of individuals.

The error in this reasoning is compound. First, property rights are fundamental rights entitled to protection under 42 U.S.C. § 1983. And, property rights are normally created and defined by state law. In the predecessor case, *Reserve Limited v. Town of Longboat Key*, 17 F.3d 1374, 1380 (11th Cir. 1994), the court held that "As Reserve possessed a building permit and expended large amounts of money in reliance thereon, Reserve had, under Florida law, a vested property right in its permit." The court therefore concluded that ". . . Reserve had a property interest protectible under the Fourteenth Amendment." The court below believes that this *Reserve* decision is no longer good law because of the *McKinney* doctrine which is recognized only by the Eleventh Circuit and courts of states within that circuit. But this doctrine has no foundation in the Constitution or in the previous decisions of this Court.

The other fundamental error is the artificial distinction drawn between legislative as opposed to executive deprivations of constitutional rights. This Court as early as 1879 recognized that "The prohibitions of the Fourteenth Amendment are directed to the States and they are, to a degree restrictions of State Power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative or judicial." *Ex Parte Virginia*, 100 U.S. 339, 346 (1879). It is difficult to ascertain the source of the executive

as opposed to legislative acts distinction created by the Eleventh Circuit Court of Appeals. It is grounded, in part, on *Collins v. City of Harper Heights, Texas*, 503 U.S. 115 (1992) which held that "The City is not vicariously liable under § 1983 for the constitutional torts of its agents: It is only liable when it can fairly be said that the City itself is the wrongdoer." *See, e.g., id.*, at 122. Reliance on that case is misplaced. The plaintiff in that action was the widow of a municipal employee who died an accidental death of asphyxia after entering a sewer system and claimed the City had failed to properly train its municipal workers. This case should be analyzed instead under the principles announced in *Monnell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), the seminal case which first extended § 1983 liability to municipalities. It recognized as constitutional violations ". . . deprivations visited pursuant to governmental 'custom' even though such a custom had not received formal approval through the body's official decision making channels." *See, e.g., id.*, at 691. It is difficult to reconcile the *McKinney* doctrine with the express language of § 1983 which applies to any custom, or usage as well as any statute, regulation or ordinance which deprives any person of any rights, privileges or immunities secured by the Constitution. If the framers of this section intended that it only apply to legislative actions, why did they include the customs or usage language? And the statute applies to rights secured by the Constitution, not just rights created by the Constitution. The *Yardarm* case is one in which the highest municipal officials, acting officially and in concert with the City's elected officials, deliberately deprived the landowner of its constitutional rights in real property. It can safely be said that the city itself is the wrongdoer and is, as the finder of fact below correctly found, liable for damages under § 1983.

## CONCLUSION

The decision below significantly erodes the constitutional protection of rights in real property for landowners in the State of Florida and other states within the jurisdiction of the Eleventh Circuit Court of Appeals. There is no support in the Constitution or the decisions of this Court for the doctrine that real property interests are inferior to other constitutional rights and that deprivations of such rights will go without a § 1983 remedy if done by executive as opposed to legislative actions.

The decision below has the pernicious effect of giving municipalities and others acting under color of state law a road map for how they can violate people's constitutional rights in real property and get away with it. This turns the Fourteenth Amendment on its head. The amendment was designed to vindicate constitutional rights for all, including state created rights in real property. If allowed to stand, the decision below will positively encourage municipal decision makers to create arbitrary and capricious roadblocks for owners who wish to put their properties to commercial or agricultural use. And it sends the economically discouraging message that permits that all owners must have before making commercial or agricultural use of their property can be withdrawn with impunity.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 03-531

In The

# Supreme Court of the United States

YARDARM RESTAURANT, INC.,

*Petitioner,*

vs.

THE CITY OF POMPANO BEACH,

*Respondent.*

**On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, Fourth District**

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE* SUPPORTING PETITIONER

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

DALE LEDBETTER hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for Petitioner has been obtained. The consent of the attorney for Respondent was requested but refused.

Ledbetter's interest in this case arises from numerous facts. He is a citizen and property owner in Broward County. He will be substantially impacted as a citizen and property owner by the ruling of the lower court. He is familiar with the facts in this case and to permit the ruling of the lower court to stand is an affront to Ledbetter and all citizens of Broward County, Florida.

Respectfully submitted,

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICUS CURIAE*..... 1

STATEMENT OF THE CASE..... 1

REASONS FOR GRANTING THE WRIT OF CERTIORARI ..... 3

CONCLUSION ..... 5

## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

This case involves the trampling of rights of citizens to develop property in accordance with objective development criteria adopted by a local government. The Florida appeals court ruled that citizens have no monetary remedy when they lost their property due to the actions of local politicians who unlawfully blocked a perfectly lawful development, through an egregious course of conduct over many years.

Dale Ledbetter, the *amicus* herein, is a property owner and a citizen of Broward County, Florida, who has observed the progress of this case for several decades. The local politicians have run roughshod over a private citizen for personal, partisan reasons. The Florida courts have ruled that there is no remedy. This Court should consider the viewpoint of a local property owner and citizen. This brief is filed on his behalf and all others similarly situated.

## STATEMENT OF THE CASE

Over thirty years ago, the Stephanis brothers Jim and Tom applied for approval to put a hotel on their property located in Broward County. Construction of the hotel was a lawful use authorized by local code at the time. Because of political opposition from local council members due to

[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

pressure from the neighbors, the Pompano Beach elected officials interfered in the administrative process. The City Commission did everything possible to block the development despite the fact that the Stephanis brothers were in full compliance with all local laws, codes and ordinances. The Stephanis brothers went to court repeatedly to force the City to comply with all local laws, codes and ordinances and to issue the necessary permits. In every instance, the Stephanis brothers prevailed, but the City continued to ignore rulings of the various courts and found a long menu of excuses to stall and block the development depriving the Stephanis brothers of their rights. After many years and huge legal expenses, the Stephanis brothers lost their property to foreclosure. The City then inappropriately purchased the property at a fraction of its value out of bankruptcy in what amounted to an illegal seizure.

The Stephanis brothers then filed an action to try to re-coup their losses from the City. The Stephanis brothers prevailed, but were reversed on appeal. The Florida appeals court held that there was no "taking" because the City actions only blocked one particular use, not all the uses for the property.

The second trial involved procedural and substantive due process. The Stephanis brothers won again, but the Florida appeals court reversed, holding that there was no remedy in this situation.

The Florida Supreme Court declined review in a divided court.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

Both trial courts independently of each other reached the determination that the City's actions were unlawful, egregious, and a violation of the Stephanis brothers' rights as property owners. The first trial court judge was firm in his description of what had happened:

> The course of action chosen by the city initially and throughout the years that the parties have been engaged in litigation must be described not only as arbitrary, but must also be equated with "unfair dealing." Every citizen (which includes Yardarm) has the right to expect that he will be dealt with fairly by his government. Unfair dealing by a municipality carries with it the attendant responsibility for the adverse affects it knows or should know it's deliberate action will have upon the parties with whom it is dealing . . .

The second trial court alluded to "bad faith" on the part of the City:

> The actions of the City of Pompano Beach were orchestrated by the members of the highest legislative body of the city, involving bad faith institutional bias . . .

In the first appeal the Florida appeals court ruled that there was no remedy for a "taking" despite the clear fact that the Stephanis brothers lost their property due to the improper "arbitrary" and "unfair" actions of the City. On the second appeal, the Florida appeals court ruled that there was no remedy for either substantive due process or procedural due process. The Florida courts have thus taken the frightening position that there is no remedy for the egregious course of action taken by a local government

resulting in the bankruptcy of a local citizen who only sought to do what the law allowed.

Florida appeals courts have taken the untenable position that a property owner is left with no remedy when local politicians choose to ignore their own laws, codes and ordinances to advance a political agenda.

The conclusion that there is no remedy for a property owner under the circumstances of this case has far reaching implications. This could and likely will impact the way local governments deal with citizens throughout the State of Florida. Absent a remedy, local government will be free to inflict injustice without accountability, and the rights of local citizens and landowners will be abused or destroyed. The implication reaches far beyond the Stephanis brothers' situation and will have an impact on any permitting or regulatory functions of local government.

The case law and authorities are well addressed in the Yardarm brief.

The *amicus*, as a citizen and on behalf of citizens of Broward County, State of Florida, respectfully requests that this Court accept the Petition for Writ of Certiorari to correct this long-standing injustice which has created an unworkable situation for local citizens.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 03-531

IN THE

# Supreme Court of the United States

YARDARM RESTAURANT, INC.,

*Petitioner,*

*v.*

THE CITY OF POMPANO BEACH,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE FOURTH DISTRICT

## MOTION OF THE BROWARD COUNTY LEAGUE OF CITIES, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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## MOTION TO FILE AMICUS CURIAE BRIEF

Comes now the Broward County League of Cities, Inc., a Florida Non-Profit Corporation, pursuant to Supreme Court Rule 37.2, and hereby moves for leave to file an Amicus Curiae Brief in support of Respondent, City of Pompano Beach. Respondent has consented in writing to the filing of this brief. Petitioner's counsel has advised the undersigned counsel counsel that Petitioner also consents, but the undersigned did not receive written verification of such consent prior to the time is was necessary to finalize and copy the proposed *Amicus Curiae* Brief for filing by December 8, 2003. A copy of the proposed *Amicus Curiae* Brief is attached hereto.

As more fully explained on page 1 of the attached brief, the Broward County League of Cities, Inc. (the "League") is comprised of approximately thirty (30) municipalities in Broward County, Florida. The League reviews, addresses and promotes interests of local government common to the municipalities of Broward County, Florida. The League is well positioned to address the issues presented in the Petition and the *Amicus Curiae* that support Petitioner's arguments, and the ramifications on municipalities of granting the requested relief.

The League is seeking to participate in this case due to the dangers to local government should the relief requested by Petitioner, as well as *Amicus Curiae* supporting Petitioner, be granted. In particular, the dramatic exposure that would befall local government should this Court accept Petitioner's invitation to expand liabilities to executive actions, and to create an undefined new form of liability in cases that do not meet current federal constitutional standards for relief. If such were to occur, the floodgates of federal litigation would be thrust wide open, and local planning and development actions would be severely and adversely affected.

Accordingly, the League respectfully requests that this Court grant leave to file the attached *Amicus Curiae* Brief.

Respectfully submitted,

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## TABLE OF CONTENTS


| | *Page* |
|---|---|
| TABLE OF CITED AUTHORITIES ..... | ii |
| INTRODUCTION ..... | 1 |
| SUMMARY OF ARGUMENTS FOR DENYING THE PETITION ..... | 2 |
| I. THE FLORIDA FOURTH DISTRICT COURT OF APPEAL APPLIED THE CORRECT LAW IN DISTINGUISHING BETWEEN "LEGISLATIVECONDUCT" AND "EXECUTIVE CONDUCT" ..... | 3 |
| II. THE RELIEF REQUESTED BY THE PETITIONER IN SECTION V OF THE PETITION, THAT THIS COURT CREATE A NEW CONSTITUTIONAL BASIS FOR RELIEF IN CASES THAT DO NOT MEET THE CURRENT STANDARDS FOR RELIEF WOULD BE DISASTROUS ..... | 6 |
| CONCLUSION ..... | 8 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases**

*Agins v. City of Tiburon*,
447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) ..... 2

*City of Pompano Beach v. Yardarm Restaurant, Inc.*,
834 So.2d 861 (Fla. 4th DCA 2003) ..... 2, 4

*McKinney v. Pate*,
20 F.3d 1550 (11th Cir. 1994 (en banc), *cert. denied*, 513 U.S. 1110, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995) ..... 5

*Metropolitan Dade County v. Betancourt*,
559 So.2d 1237 (Fla. 3rd DCA 1990) ..... 4

**Statute**

42 U.S.C. § 1983 ..... 3

## INTRODUCTION

Comes now the Broward County League of Cities, Inc., a Florida Non-Profit Corporation, pursuant to Supreme Court Rule 37.2, and files this *Amicus Curiae* Brief in support of Respondent, The City Of Pompano Beach. Written consent for participation in this case by the Broward County League of Cities was granted by counsel of record for the Petitioner Respondent. Oral consent was obtained from the Petitioner's counsel, however written acknowledgement of Petitioner's consent was not received by counsel prior to filing this brief. Copies of such consent is being lodged herewith.[1]

The Broward County League of Cities, Inc. (the "League") is comprised of approximately thirty (30) municipalities in Broward County, Florida. The League reviews, addresses and promotes interests of local government common to the municipalities of Broward County, Florida. Issues relating to property rights and recovery for damages directly impact on the members of the League. The League is seeking to participate in this case due to the dangers which would affect local government should the relief requested by Petitioner, as well as *Amicus Curiae* supporting Petitioner, be granted. Such relief would have a chilling affect on the day-to-day operations of local government relating to land development and building issues, and would open the floodgates to disgruntled property owners who desire to make a federal case out of any decision by a

1. Pursuant to Rule 37.6, *Amicus Curiae* Broward County League of Cities, Inc. affirms that no counsel for any party in this case authored, in whole or in part, this brief. The Respondent is a member of the Broward County League of Cities. Other than the Broward County League of Cities as a whole, no person or entity (including Respondent) has made a monetary contribution specifically for the preparation or submission of this brief.

local building or zoning official that adversely impacts on that property owner's *perceived* development interests.

In particular, the distinction between legislative action and executive action in the local government context is paramount to ensuring that day-to-day decisions of municipal officers and employees tasked with enforcing and interpreting building and zoning ordinances and regulations, do not prematurely expose local governments to the extreme risks of a Federal damages claim, denying elected officials the opportunity of addressing such issues prior to property owners taking municipalities to Federal court.

Section V of the Petition is extremely troublesome to the members of the League, and should alarm all local governments across the United States. Petitioners are requesting this Court to create a new remedy in cases that do not meet current takings standards. This lower threshold for constitutional relief must be rejected, for to endorse such would create uncertainties that would open the door to federal litigation in just about any situation where a local government acts inconsistent with a property owner's wishes.

## SUMMARY OF ARGUMENTS FOR DENYING THE PETITION

The Petition for Writ of Certiorari should be denied by this Court. The decision of the Florida Fourth District Court of Appeal in *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 834 So.2d 861 (Fla. 4th DCA 2003), is correct and consistent with all applicable precedence, including previous decisions of this Court such as *Agins v. City of Tiburon*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). The League assumes that Respondent will address much of the legal arguments advanced by Petitioner, and so it will not belabor this Court with its own analysis.

Unfortunately, it appears that the Petitioner, and *Amicus Curiae* who support Petitioner's position, are using the lower court decision as an opportunity to change and expand the current law, and lower the threshold of relief for property owners. Petitioners and the *Amicus Curiae* that support it may not like the law, but it is the law and there is no reason change it. Such action by this Court would open the proverbial floodgates of litigation in federal courts relating to takings and due process claims for even the most routine zoning and planning decisions. Any change or expansion of relief as sought by Petitioner and the *Amicus Curiae* that support it would adversely and severely affect the ability of local governments to regulate and oversee development on behalf of the public as a whole. The League has filed this brief to advise this Court of the practical implications of the Petitioner's arguments and the relief requested therein.

## I. THE FLORIDA FOURTH DISTRICT COURT OF APPEAL APPLIED THE CORRECT LAW IN DISTINGUISHING BETWEEN "LEGISLATIVE CONDUCT" AND "EXECUTIVE CONDUCT"

The Petitioner and *Amicus Curiae* plead with this court to expand municipal liability by allowing actions and decisions of City officers and employees, known as "executive" actions, to expose the municipality to liability for a substantive due process claim under 42 U.S.C. § 1983. Should the Court do so, it will impose upon the federal judiciary the responsibility of being a super-administrative agency, reviewing everyday decisions of building and zoning officials. As noted by the Fourth District Court in this case, "[t]he acts complained of consisted of delays in issuing building permits, wrongful revocation of building permits, delays in [zoning] reviews, and an attempted repeal of a

special exception." *Id.* at 870.[2] As found by the Florida Fourth District Court of Appeal, none of these actions were legislative in nature. Some of these actions, such as delays in issuing permits and delays in zoning review, are common occurrences in municipalities, caused by reasons too numerous to list. Potential routine review of delays in federal court would hamstring municipal government's land planning and building review.

Everyday, hundreds of building and zoning officials are reviewing, approving, or denying applications for building permits, site plans and other development and building requests. Unfortunately, many of these applications are delayed either through sheer volume of work and prioritization by these officials, or due to disagreements with applicants as to interpretations of building or zoning regulations. Each and every application will involve decisions by these officials that may not be well-received by property owners. Review of these decisions in federal court under a substantive due process claim will open the door to federal court review of limitless numbers of every day decisions to make ultimate factual determinations of reasonableness or arbitrariness. This potential floodgate of claims cannot and should not be permitted.

It is important to remember that executives without "final policy-making authority"[3] ultimately answer to those persons with final policy-making authority, i.e. the legislative

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2. A special exception is generally a use permitted by a local zoning code only after certain conditions are met and a public hearing conducted. *See e.g., Metropolitan Dade County v. Betancourt,* 559 So.2d. 1237 (Fla. 3rd DCA 1990).

3. *City of Pompano Beach,* 834 So.2d. at 869.

body of the City. The legislative body operates as a check on executive decision-making authority. This fact belies the misguided argument advanced by *Amicus Curiae* Sugar Cane Growers Cooperative of Florida, on page 11 of its brief that the decision below "will positively encourage municipal decision makers to create arbitrary and capricious roadblocks for owners[.]" The ultimate decision makers in municipalities are the elected officials, who sit on governing bodies and act legislatively.

As observed by the court in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994 (en banc), *cert. denied*, 513 U.S. 1110, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995), legislative actions are held to a higher standard in that they apply to larger segments of society. The distinction between executive and legislative actions is critical in the land development arena. To open the door to challenges of executive actions would be to condone immediate court challenges to any adverse decision in normal day-to-day review of building and zoning matters. This would effectively remove the opportunities for municipal governing bodies to address the issues prior to the municipality and its taxpayers being exposed to defending a federal lawsuit, simply because a property owner disagrees with a decision of a building or zoning official.

## II. THE RELIEF REQUESTED BY THE PETITIONER IN SECTION V OF THE PETITION, THAT THIS COURT CREATE A NEW CONSTITUTIONAL BASIS FOR RELIEF IN CASES THAT DO NOT MEET THE CURRENT STANDARDS FOR RELIEF, WOULD BE DISASTROUS

In Section V of the Petition, Petitioner urges this court to create a totally new cause of action apparently heretofore not recognized in over two centuries of this Court's constitutional property rights jurisprudence. It argues that a parade of horribles that allegedly occurred in this case justify some un-quantifiable leap in jurisprudence to provide a cause of action in cases that do not meet the current legal standards for takings or due process claims. This court, respectfully, should decline to do so.

Current jurisprudence provides adequate protections for all property owners. If the facts of a case support a claim for a taking, or substitutive due process claim, the property owner may obtain relief to which he or she would be entitled. The new relief sought by Petitioners is ambiguous at best, and would encourage federal litigation in even the most routine disagreements between municipalities and property owners.

Petitioners fail to adequately explain to the Court what types of infringements would expose a municipality to potential liability. If actions of a local governing body delays issuance of a permit, should a federal court step in and award money to the applicant solely for the delay? For example, if the delay causes a fluctuation in interest rates to adversely affect a developer, is a municipality facing a federal lawsuit and damages resulting from such harm? Depending on the

scope of the project, or the affect on the property owner, such could be asserted to be "serious damage." Petitioner wants this Court to create a right for a property owner to march to the nearest federal courthouse and obtain relief.

Combining it with Petitioner's request to have this Court change the law and have executive actions be subject to substantive due process claims, the standard and relief sought by the Petitioner in Section V of the Petition would result in the potential for federal courts being asked to resolve just about every disagreement between a property owner and a municipality over development rights and applications. Under Petitioner's argument, theoretically, if a building official interpreted a local building code in a manner not favored by a property owner which required additional time to resolve, the property owner could sue in federal court if it turned out the building official was incorrect. Ultimately, there may be factual issues that need to be resolved, but the specter of federal court litigation would hang over the head of otherwise diligent municipal planners and building officials. Access to federal courts would be turned into a sword to be wielded against municipalities instead of a shield for property owner rights.

Just as property owners demand protection of their rights, municipalities are entitled to be able to rely on reasonably defined legal standards in order to ensure that actions taken by the municipality do not violate the law. Current takings and due process Constitutional causes of action provide the requisite guidance and protections. Opening the doors to additional causes of action, that would be based on just about any action by a municipal building or zoning official, would create havoc for municipalities. The federal courts would be injected into in the everyday disagreements. Such a drastic

change in the current state of the law would certainly open the floodgates for litigation. It would result in federal courts overseeing everyday decisions, a role best left to administrators.

## CONCLUSION

The Petition should, respectfully, be denied.

Respectfully submitted,

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